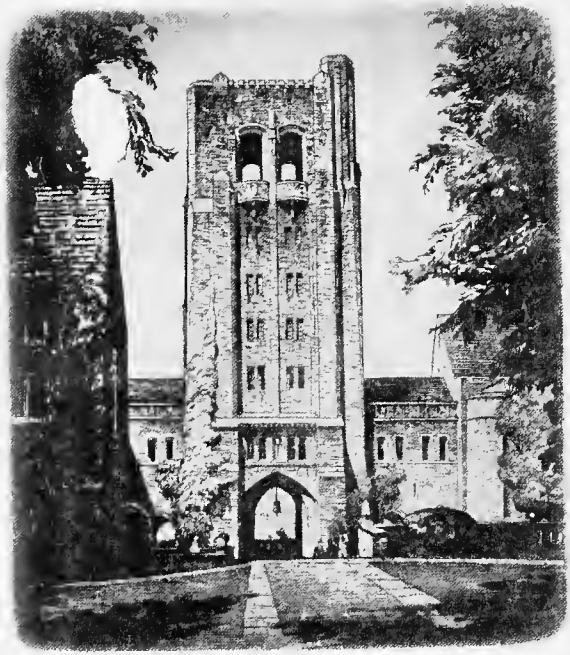

TREATISE

ON THE

LAW

OF

MUNICIPAL CORPORATIONS.

BY

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Dedication.

TO THE HONORABLE

SAMUEL F. MILLER, LL. D.,

ASSOCIATE JUSTICE OF THE SUPREME COURT
OF THE UNITED STATES.

WHETHER I SHARE IN THE GENERAL ADMIRATION OF YOUR JURIDICAL TALENTS, OR LISTEN TO THE MORE PERSUASIVE SUGGESTIONS OF A VOICE THAT COMES TO ME FROM LONG ASSOCIATION AT THE BAR AND UPON THE BENCH, THERE IS NO ONE TO WHOM I CAN INSCRIBE, SO FITTINGLY AS TO YOURSELF, A WORK RELATING TO AN IMPORTANT BRANCH OF THAT SCIENCE WHICH YOU HAVE STUDIED SO DEEPLY AND UNDERSTAND SO WELL.

PREFACE.

The necessity for a work upon the subject of the present Treatise was so seriously felt by the author when holding a seat on the Supreme Bench of a state where questions relating to the powers, duties, and liabilities of municipalities were presented at almost every term, that he resolved, eight years ago and more, to undertake to supply the want. Although the subject is one of unsurpassed practical importance, since nearly every considerable city and town in the United States is incorporated, no American work upon it has ever appeared. A careful examination of the English treatises satisfied the author that they were, in a great measure, inapplicable here, and that they fail to cover a large portion of the existing field of the law upon the subject as enlarged by American legislation and practice. True, our municipal system, like the body of our jurisprudence, was derived from England, but it is remarkable how many changes were necessary to adapt it to our system of government and modes of administration, and to the wants and situation of our people. Accordingly, if the municipalities of the one country be closely compared with those of the other, it will be found that in their structure, powers, and workings, they present quite as many points of difference as of similarity.

We have popularized and made use of municipal institutions to such an extent as to constitute one of the most striking features of our government. It owes to them, indeed, in a great degree, its decentralized character. When the English Municipal Corporations Reform Act of 1835 was passed there were in England and Wales, excluding London, only two hundred and forty-six places exercising municipal functions; and their aggregate population did not exceed two millions of people. In this country our municipal corporations are numbered by thousands, and the inhabitants subjected to their rule by millions.

Our municipalities are habitually clothed by the legislatures with extensive, important, and diversified powers, and consequently possess a much more composite character than in England or elsewhere. Strictly, a municipal corporation is an institution designed to regulate and administer the mere local or internal concerns of the incorporated place in matters pertaining to it and not relating directly to the people of the state at large. But in this country, much more generally than in England, it is the practice to make use of the municipality, or of its officers, as agencies of the *State*, for the exercise, on its behalf, of *public*, in addition to *corporate*, duties and functions. From the difference between these two classes of powers the American courts have deduced consequences so important that it is as necessary, as it is oftentimes difficult, to distinguish between them. Besides, it has, unfortunately, become quite too common with us to confer

upon our corporations extra-municipal powers, such as the authority to aid in the construction of railways, or like undertakings, which are better left exclusively to private capital and enterprise, and to create, in their corporate capacity, indebtedness therefor, enforceable by actions in the courts, and which must be paid by taxation.

Invested, also, within certain limits, with delegated legislative authority concerning the property and conduct of their inhabitants; with power, more or less extensive, to acquire and dispose of property; with the right to elect their own officers; to make contracts; to incur liabilities; to exercise Eminent Domain; and the equally momentous power, to levy and collect taxes, general and special; these corporate agencies are thus brought into intimate and daily contact with the most important rights and interests of their inhabitants, and as a result, we have an amount and variety of litigation not to be found in the tribunals of other countries. In no English treatise on Municipal Corporations is there a chapter upon the subject of civil actions and liabilities, and no discussion of the question as to their amenability to respond civilly in damages to individuals for acts of misfeasance, or for neglect of duty; and for reasons not material to be here stated, the occurrence of questions of this kind in the English tribunals has been comparatively infrequent. The American Reports, however, teem with cases on this subject, and the civil liability of municipal corporations upon contracts and for torts, and the mode of enforcing it, are with us the most important practical topics requiring treatment in a work of this character.

There being no American work on this branch of the law, and the decisions in this country relating to it being scattered through the reports of the federal courts, and those of thirty-seven states, there was little to guide the author, either as to the arrangement of his subject or as to what had been decided by the courts concerning it. Accordingly, he had no resource except to delve laboriously for his materials among hundreds of volumes; but these have, one by one, been examined by him with a view to find all that could be advantageously used to illustrate the subject, and the result is given, either in the text or notes, as fully as it was practicable within the compass of a single volume. Nor has he overlooked the aid to be derived from other sources. Every English publication relating to the subject in its legal or practical relations has been subjected to examination; books which could not otherwise be had have been specially procured from abroad. And, throughout the present volume, no inconsiderable pains have been taken to set forth wherein the English and American municipalities differ, so that the applicability and precise legal value of the judicial decisions of the former country would be better understood.

When the work was resolved upon, the author hoped to proceed with the leisurely care that would enable him to avoid the faults which thorough deliberation might result in correcting. This hope has not been as fully realized as he desired, for year by year his official duties have more and more encroached upon his time, leaving for this work only the diminishing intervals between courts. In its preparation he has often envied the author by profession the opportunity for continuous and unbroken labor, and he cannot but feel that if his work had not been prepared in

fragments, it would not have fallen both so far below his ideal, and what, under more auspicious circumstances, he himself might have made it. It is hoped, however, if it shall lack the symmetry and finish such an author would have given it, that it may have compensating advantages in its thoroughly *practical character;* and these it will surely owe to that experience to which the mere student or professional writer must ever be a stranger, and which can be had only upon the bench or at the bar.

Some peculiarities in the *manner* of its preparation will be observed. The aim throughout has been to make a work which will be useful to the profession. Aware that in most places access to complete law libraries cannot be had, the author has endeavored, as far as practicable, to supply this want and to make the text and notes exhibit the substance of the adjudications. This explains why so much care has been taken to cite the cases bearing upon the subjects discussed, and accounts for the fulness of proofs and illustrations to be found in the notes.

He trustfully submits the Work, which fills up the interstices between judicial duties for nearly nine years, to the profession for whose assistance it is designed, and whose final judgment upon it will not be otherwise than just. If he could be assured that it has a value at all proportioned to the labor first and last bestowed upon it, he would venture to hope for a judgment not altogether unfavorable.

DAVENPORT, IOWA, 1872.

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MUNICIPAL CORPORATIONS.

CHAPTER I.

MUNICIPAL INSTITUTIONS.—INTRODUCTORY HISTORICAL VIEW.

§ 1. It does not fall within the scope of the present treatise to give a detailed account of the origin and rise of cities and towns, nor to trace minutely the *history* of the rights, powers, and jurisdiction with which they are now generally invested. Such an inquiry more appropriately belongs to the legal antiquary or to the historian; and yet a brief historical survey of the rise and progress of municipalities is essential to an intelligent understanding, even its practical bearings, of the subject of which it is proposed to treat. The origin of towns and cities, and the exercise by them, to a greater or less extent, of local jurisdiction, may be ascribed to a very early period.

Phœnicia and Egypt were long noted for their large and splendid cities. In the latter country, we find Memphis, one of the old world's proudest capitals, whose location, even, was, until late in our own day, a matter of learned conjecture and speculation. It was, centuries ago, buried beneath the floods of the encroaching desert, and in our own day it has been exhumed in the presence of Bedouins too wild to be interested in the wondrous revelations of its entombed mysteries. Temples and buildings, vast and magnificent, dating, probably, fifteen centuries before the Christian era, and preserved by burial, both from decay and spoliation, may to-day be seen almost in their original perfection. There, too, in "old, hushed Egypt and its sands," on the banks of the Nile, are the massive ruins of Thebes (Diospolis), the city of "the

hundred gates," ante-dating secular history, and claimed by the Egyptians to have been the first capital, as it undoubtedly was one of the oldest cities, of the world. As the eye runs along the colonnades of ruined temples, the mind runs back through the Egypt of the Ptolemies to the Egypt of the Pharaohs, four thousand years ago, when Thebes was in its splendor and its pride. But in the midst of these stupendous remains of this early civilization, we find no evidence of their municipal history and organization. The chief lesson they teach is, that they were the centres of great wealth and power in the governing class, and that the *people*, who constitute the true wealth of modern cities, were at the absolute disposal of their masters, bound down and degraded by servitude.

§ 2. Notwithstanding the people of Greece were of a common blood, language, and religion, Greece was never politically united. Political power resided not in a number of independent states, but in a large number of free and independent *cities*, with districts of country adjoining or attached to them. Each city, except in Attica, was sovereign —was the sole source of supreme authority—and possessed the exclusive management and control of its own affairs. The citizen of one was a foreigner in the others, and could not, without permission or grant, acquire property, make contracts, or marry out of his own city. The Grecian heart always glowed with patriotic fervor for the city, but rarely, except in times of great common danger, kindled with a love for the whole country. And although, according to Chancellor Kent,[1] the "civil and political institutions of some of the states of Greece bear some analogy to the counties, cities, and towns in our American states," yet the analogy, it must be confessed, is both remote and uncertain, and without practical value in the inquiries we are to prosecute.

§ 3. Municipal as well as private corporations were familiar to the Roman Law. "To conceive," says a modern writer, "of ancient Rome as the capital of Italy in the same sense that London is the capital of England, or Paris of

[1] 2 Kent Com. 268, note.

France, would be a great mistake. London and Paris are the chief cities of their respective countries, because they are the seat of government. The people of these cities and their surrounding districts have no privileges superior to those of other English or French citizens. But the city of ancient Rome, with her surrounding territory, was a great corporate body or community, holding sovereignty over the whole of Italy and the provinces." None but persons enrolled on the lists of the tribes had a vote in the popular assemblies or any share in the government or legislation of the city."[1] The common division of civic communities established by the Roman government was three, *prefectures*, *municipal towns*, *and colonies*. The prefectures did not enjoy the right of self-government, but were under the rule of prefects, and the inhabitants were subjected to the burdens, without enjoying any of the privileges of Roman citizens. But with the *municipal towns* it was different. They at length received the full Roman franchise, "and hence," says the learned author just named, "arose the common conception of a municipal town; that is, a community of which the citizens are members of the whole nation, all possessing the same rights, and subject to the same burdens, but retaining the administration of law and government in all local matters which concern not the nation at large,"— a description which answers almost perfectly to the modern notion of municipal organizations in England and America. The *colonies*, composed of Roman citizens, were established by the parent city, sometimes to reward public services, but generally as a means of securing and holding the country which had been subdued by Roman arms. The constitution of these colonies, and the rights of the citizens and communities composing them, varied, but it is not necessary for our purpose to trace these differences. The colonies were obliged to provide for the erection of a city, and cities thus erected were called *municipia*. We thus perceive the justness of the observations of a distinguished modern historian and statesman, who says that "the history of the conquest of the world by Rome is the history of the conquest and foundation of a vast number of cities. In the Roman world in Europe there was

[1] Dr. Liddell, Rome, Chap. XXVII. sec. 8.

an almost exclusive preponderance of cities and an absence of country populations, and dwellings." [1] The nation was a vast congeries of municipalities bound together by the central power of Rome.

When the Romans colonized and settled the countries which they conquered they established fixed governments and carried with them, and to a greater or less extent necessarily imparted, their arts, sciences, language, and civilization to their new subjects. And although the political condition of the vanquished people was far from being desirable, still the immediate residence among them of the highly cultivated Roman could not fail to produce effects more or less beneficial; and thus the *municipia*, securing what the Roman arms had achieved, became the efficient means of spreading civilization throughout the Roman world.

§ 4. After the subversion of the Roman Empire the towns of Europe from the fifth to the tenth century were in a state neither of servitude nor liberty, though their condition differed greatly in different countries. During this period the power and influence of the towns were, in general, on the decline. The power of the church was great, and the inhabitants found their chief protection in the clergy.

The establishment of the feudal system worked a great

[1] M. Guizot's Hist. Civilization in Europe, Lect. II: "Rome, in its origin, was a mere municipality, a corporation. In Italy, around Rome, we find nothing but cities — no country places, no villages. The country was cultivated, but not peopled. The proprietors dwelt in cities. If we follow the history of Rome, we find that she founded or conquered a host of cities. It was with cities that she fought, it was with cities she treated, into cities she sent colonies. In the Gauls and Spain we meet with nothing but cities; the country around is marsh and forest. In the monuments left us of ancient Rome we find great roads extending from city to city; but the thousands of little by-paths now intersecting every part of the country were unknown. Neither do we find traces of the immense number of churches, castles, country seats, and villages which were spread all over the country during the middle ages. The only bequests of Rome consist of vast monuments impressed with a municipal character, destined for a numerous population, crowded into a single spot. A municipal corporation like Rome might be able to conquer the world, but it was a much more difficult task to mould it into one compact body." *Ib.* See also 2 Kent Com. 270, note; Dr. Adam Smith's interesting chapter. Wealth of Nations, Book III. Chap. II.

change in the condition of the towns. Before that, towns, as we have seen, were the centers of wealth and population. The ruling class lived within them. The land was cultivated by persons who were not recognized as having any political rights. After feudalism was established, this changed. The proprietor then lived upon his estates, instead of living within a town; the town became part of the lands of the lord, or enclosed within his fief. It, with its population, became thus subject to his arbitrary exactions, oppression, and pillage. Still the towns gradually prospered, and with prosperity came wealth; with wealth came influence and power. Such, in general, was the condition of the towns of continental Europe down to the eleventh century. About this time, without any union or concert, many of them in most of the countries of Europe rose against the lords, and demanded for the burgesses, commonalty, or inhabitants, a greater or less measure of enfranchisement. Sometimes a town failed in its struggle, and its oppression was redoubled by the victorious lord. Sometimes the towns were aided by the king, who was frequently not unwilling to humble the arrogant and haughty nobility and thereby acquire the influence and affection of those whom he thus assisted. Not unfrequently, however, the struggle had to be maintained by their own unaided resources, and when successful, the result was the granting of CHARTERS, conferring more or less extensive municipal immunities and rights, by the lords to the burghers. These charters, as Guizot justly observes, were in the nature of "treaties of *peace* between the commons and their lords;" were, in fact, "bills of rights" for the people.[1] During the twelfth century, "all Europe, and especially France, which for a century had been covered with insurrections, by burghers against their lords, was covered by charters more or less favorable; the corporators enjoyed them with more or less security, but still they enjoyed them."[2]

[1] People *v.* Morris, 13 Wend. 325, 334, per *Nelson*, J.

[2] Guizot's Hist. Civ. in Europe, Lecture VII. This philosophic and valuable work is the source from whence are drawn most of the statements of the text as to the condition of the towns of Europe from the fifth to the tenth century. See similar account, Wealth of Nations, Book III. Chap. III.; Hallam's Middle Ages, Chap. II. part II., and notes to later editions.

§ 5. After the overthrow of the Roman Empire and the civilization which accompanied the Roman power, Europe became indebted to cities and to the authority which they acquired, and the jurisdiction which they exercised for the creation of the third estate — popular power — and for the development of the principles of constitutional or free government.[1]

The Italian cities, especially Venice, Genoa, and Pisa, grew rich from the commerce resulting from the vast armies which the Crusaders for two hundred years had successively pushed forward into the Holy Land. The oppressive feudal system was at this time in full force throughout Europe. These Italian cities used their power and wealth to secure their independence. Cities and towns, as well as people who dwelt in the country, were alike subject to the arbitrary and oppressive exactions of their feudal masters. Some of the cities in the eleventh century obtained their freedom by purchase, and some by force, and some by gift. They were, in effect, constituted so many little republics, with the right to manage their own concerns. In this way, before the conclusion of the thirteenth century, nearly every considerable city of Italy was enfranchised or had received extensive corporate immunities from the sovereign or lord. The happy effects were soon perceived in the increased population and prosperity.

§ 6. Whether from example, as asserted by Dr. Robertson, or from other causes, the came course was adopted by the cities of the other states of Europe. The king of France, Louis le Gros, and his great barons, granted many *charters of community*, by which the inhabitants were freed from feudal servitude and erected into municipal corporations, with the power of local self government. These charters contained grants

[1] "The institution of cities into communities, corporations, or bodies politic, and granting them the privilege of municipal jurisdiction, contributed more, perhaps, than any other cause, to introduce regular government, police, and arts, and to diffuse them over Europe." Robertson's Charles V.; See Hallam's Middle Ages, Chap. II. part II. M. Guizot considers the three great elements of modern civilization to be the Feudal System, the Christian Church, the Commons, or free corporate cities; Civ. in Europe, Lecture VII.; see also Wealth of Nations, Book III. Chap. III., on "The Rise and Progress of Cities and Towns, after the Fall of the Roman Empire."

of new privileges, and prescribed salutary methods for the enforcement of rights and the redress of grievances. They are both interesting and instructive, and a brief view of their character is given in the note.[1]

We meet, in France, with great diversity in the origin and government of towns and cities. In some of them, especially in southern France, the Roman municipal system, more or less modified from time to time, was perpetuated. The Roman system was formed upon an aristocratic model. In each *municipium* there was a senate, called an *ordo* or *curia*. This was, politically considered, the city; it was the governing body. The mass of the population, except in a few cases, had no voice in municipal affairs. This senate was composed of a comparatively small number of families, and the office was hereditary. When it became thinned or reduced by

[1] In those turbulent times *personal safety* was an object of the first importance, and this was usually afforded to the vassal by the baron or lord. The communities or free towns which were instituted, undertook to provide for the safety of their members, independent of the nobles. For, 1. All the members were bound by oath to assist and defend each other against all aggressors. 2. All residents in a town made free, were obliged to take part in the mutual defence of its members. 3. The communities could execute the judgements of their magistrates by coercion, if necessary. 4. The practice of making private satisfaction for crimes was abolished, and provision made for the regular punishment of offenders. 5. A person reasonably suspected to be about to injure another, might, as with us at the present day, be compelled to give security to keep the peace. These communities also undertook to provide for the *security of property* by the following: 1. Abolishing the right of the creditor to seize the effects of his debtor with his own hand and by his private authority, and compelling him to proceed before a magistrate, who was authorized to issue the necessary process for the seizure and sale of property, humane and necessary exemptions being allowed. 2. Every member was obliged to bring some of his property into the town, or build a house, or buy land; and in some places the members were bound for each other. 3. Judgments by magistrates duly selected, took the place of the arbitrary and capricious decisions of the baron or feudal lord. 4. Arbitrary taxation was prohibited, and regulations for an equal tax were sometimes especially prescribed. Digested from Robertson's Charles V., Vol. I. note XVI. Proofs and Illustrations. "The communities of France never aspired," says this accurate and elegant historian, "to the same independence with those in Italy. They acquired in France new privileges and immunities, but the right of sovereignty remained entire to the king or baron within whose territories the respective cities were situated, and from whom they received the charter of their freedom." *Ib.*

death or otherwise, it was not filled by the people, the mass of the population, but by the survivors. Other towns or communities originated, in the most natural manner, upon the fiefs or estates of the feudal proprietors. Many of these estates became centres or agglomerations of population composed of the working and industrial classes. Trade sprung up, and towns and cities originated. The lord, or proprietor, was interested in, and derived profit from, their prosperity. To induce others to settle there, he often conceded certain privileges. He did not emancipate them from all feudal restraints or domination, but mitigated these. Often he granted lands and privileges to all who settled in towns on his domains, on receiving a moderate fixed rent and certain specific military services. These concessions had no higher origin than the personal interest of the proprietor, and were often violated. They did not constitute the towns locally independent, or make them true corporations. But limited and uncertain as these concessions were, the towns which received them prospered and became more or less important.

Other places were chartered towns and true corporations. In the twelfth century there was the general movement, before noticed, on the part of the towns of France, for their enfranchisement, or delivery from feudal bondage. The extent of this movement may be judged from the fact that the *royal* charters of this period are numbered by hundreds, and those granted by the *lords*, by thousands. These were, in general, wrested from the feudal proprietors by force, or the fear of it, and conferred an almost independent political existence upon the *commune*, or town. These charters gave the community the power of having its people judged for offences by magistrates of their own choosing; crimes and punishments were defined; arbitrary rents and taxes abolished, and fixed rents and regular taxes substituted; *main-morte* and other restraints upon the alienation and enjoyment of property were removed. The government of towns thus created, unlike those which were mere perpetuations of the Roman system, was formed upon a *democratic* model. A voice was given to all burghers, or persons of a certain fortune, or who exercised a trade or calling. In a word, with considerable diversity,

this class of towns was independent, and possessed the power of self-government. From and after the fourteenth century, the political power and influence of the towns of France decayed. The causes of this decline have been traced, with a masterly hand, by M. Guizot, but they do not relate to our purpose.[1] In the course of change, we may remark, that the royal power over them became predominant, and instead of being self-governed, they were, and are, administered by the ntendants, or officers of the king or emperor, or central authority at Paris.

Towns, or *communes*, in France are now governed by a mayor and council. By the law of 1855, in all *communes* of 3,000 inhabitants and upwards these officers are appointed by the emperor; while in smaller *communes* the appointment is made by the prefect of the department, himself appointed by the emperor. The prefect may suspend municipal councillors, but the emperor alone can dismiss them.[2]

§ 7. It seems to be well established, that the towns and cities of Spain acquired charters of freedom at an earlier period than towns in France, England, or Germany.[3] The cities of Italy, as we have seen, owed, to a large extent, their

[1] History Civilization in France, Lect. XIX.; Hallam's Middle Ages, Chap. II. part II. and notes.

[2] American Encyclopedia, *Commune*.

[3] The most ancient of these regular charters of incorporation now extant was granted by Alfonso V. in 1020, to the city of Leon and its territory. It preceded, by a long interval, those granted to the burgesses in other parts of Europe, with the exception, perhaps, of Italy. Acts of enfranchisement became frequent in Spain during the eleventh century, several of which are preserved, and exhibit with sufficient precision the nature of the privileges accorded to the inhabitants. Robertson (in his History of Charles V. Introductory View), who wrote when the constitutional antiquities of Castile had been but slightly investigated, would seem to have little authority, therefore, for deriving the establishment of communities from Italy, and still less for tracing their progress through France and Germany to Spain. Prescott's Ferdinand and Isabella, Introduction, Vol. I. note 24.

Hallam, who, as well as Prescott, founds his judgment upon the historical works of Marina and Sempere, expresses a similar opinion as to the early period at which the towns of Spain were invested with chartered rights and privileges. Middle Ages, Chap. IV.; *Ib.* Chap. II. part II. and notes.

freedom to their commercial importance and wealth; but those of Spain owed their privileges and jurisdiction to an entirely different cause. For nearly eight hundred years the Gothic inhabitants of Spain had been engaged in an almost perpetual struggle against the Moors or Arabs who occupied the southern part of the peninsula.[1] It was obviously the dictate of policy, as the Spaniards gradually narrowed the boundaries of their enemies' territory, to make provision for securing and holding the ground thus gained. With this view, and for the purpose of protecting themselves from the frequent raids of their Arab neighbors, liberal charters were granted to towns, with extensive districts of country subject to their municipal jurisdiction.

By these grants or charters the citizens selected their own officers, including judges and a common council, and enjoyed all the essential rights of freemen. In return, the community or city paid a certain (no longer an arbitrary) tax or rent, and owed military service. For more effectual protection, the charters frequently prohibited the nobles from acquiring real property or erecting fortresses or palaces within the limits of the community, and subjected them to its jurisdiction when

[1] Mr. Irving's fine reflections, in his Alhambra, upon this protracted and famous contest between the Crescent and the Cross, are not inappropriate: "The singular fortunes of the Arabian or Morisco-Spaniards, form one of the most anomalous yet splendid episodes in history. A remote wave of the great Arabian inundation, cast upon the shores of Europe, they seem to have all the impetus of the first rush of the torrent. But repelled (by unsuccessful battle) within the limits of the Pyrenees, they gave up the Moslem principle of conquest, and sought to establish in Spain a peaceful and permanent dominion. Generation after generation, century after century passed away, and still they maintained possession of the land. With all this, however, the Moslem empire in Spain was but a brilliant exotic that took no permanent root in the soil it embellished. Severed from all their neighbors in the west by impassable barriers of faith and manners, and separated by seas and deserts from their kindred of the east, the Morisco-Spaniards were an isolated people. Their whole existence was a prolonged, though gallant and chivalric, struggle for a foothold in a usurped land. They were the outposts and frontiers of Islamism. The peninsula was the great battle ground where the Gothic conquerors of the north and the Moslem conquerors of the east met and strove for mastery; and the fiery courage of the Arab was at length (after 800 years) subdued by the obstinate and persevering valor of the Goth."

within its territory. Large portions of the adjacent country, as we have said, often embracing towns and villages, were annexed to the city or community and placed under its laws and jurisdiction. "Thus," says Mr. Prescott,[1] to whose researches we are chiefly indebted for this sketch of the early municipalities of Spain, "while the inhabitants of the great towns in other parts of Europe were languishing in feudal servitude, the members of the Castilian corporations, living under the protection of their own laws and magistrates in time of peace, and commanded by their own officers in war, were in full enjoyment of all the essential rights and privileges of freemen."

§ 8. Britain was one of the last conquests of the Cæsars, and was one of the first of the western provinces upon which they released their hold. The Latin language did not become the language of the people; nor did the Romans, as in many of the continental provinces, fill the country with memorials of their skill and arts. The impressions made by the mastery of the Roman were not destined to be permanent. According to an accurate explorer and philosophic modern historian,[2] Britain, when subject to Rome, was divided into thirty-three townships, with a certain share of local self-government; and *quasi* municipal institutions, for a long time after the withdrawal of the Roman power, constituted whatever of government the people possessed. At the time of the conquest of England by William of Normandy (A. D. 1066), the towns and boroughs were dependent upon the uncertain protection of the king or lord, to whom they owed rents or service, and were liable to discretionary, that is, arbitrary, rates or talliages. They were not incorporated, did not constitute bodies politic; and being composed mainly of tradesmen and the lower classes, were regarded by their feudal masters as possessed of no political and of but few civil rights. None of them enjoyed the right of representation in the council of the nation, and, with the exception, perhaps, of London and a few of the greater towns, did not possess the right of internal or self-govern-

[1] History Ferdinand and Isabella, Vol. I. Introduction, sec. 1.

[2] Sir James Mackintosh's History of England, Vol. I. p. 30.

ment. Some time between 1100 and 1125 Henry I. granted to London the original charter, in which was conferred many valuable municipal privileges, with the right, among others, to choose certain of their own officers, such as sheriff, justice, and the like.[1] But the right of local self-government was not, in general, conferred upon towns and boroughs until the time of John, who reigned from 1199 to 1216.[2] Meantime the towns and cities continued to grow in population and wealth, and as these increased, their disposition to submit to arbitrary exactions proportionately diminished, and their independent spirit and desire for freedom from oppressive restraints became more manifest; but still they did not acquire sufficient influence or importance to be allowed a representation in the states of the kingdom for more than two centuries after the conquest. It was not until the time of Edward the First that cities and boroughs, then mostly incorporated, obtained the right of returning members to parliament. The legislative power of the kingdom was at this time vested in the king and the council, afterwards called the parliament. This council was constituted of the spiritual and lay peerage. The commonalty of England had no voice or part in the legislature. This wise and politic prince was greatly distressed for money, and instead of attempting to raise it by the levy of arbitrary taxes or talliages, which were submitted to with murmurs and yielded sparingly, preferred to obtain it by the prior voluntary consent of the cities, towns, and boroughs. He hit upon this device. He caused writs to be issued to about one hundred and twenty cities and boroughs, enjoining them to send to parliament, along with the two knights of the shire, *two deputies from each borough within their county*, with authority from their

[1] This famous charter has no date. Its substance is given in Norton's Commentaries on the History, Constitution, and Chartered Franchises of the City of London, and its various provisions explained and commented on; Book II. Chap. II. p. 337. In the latter clause of this charter is an allusion to the very ancient custom of foreign attachment, in which is to be found the germ of all our foreign attachment laws. Puling's Laws, &c., of London, 188; Hallam's Middle Ages, Vol. III. Chap. VIII. part III. Mr. Norton gives the substance of all of the charters of London from the time of William the Conqueror to the present.

[2] Hallam's Middle Ages, Vol. III. Chap. VIII.

respective communities to consent to what the king and his council should require of them. As the experiment proved successful, and more money was obtained, and with less trouble, than in the former way, the practice was continued. And such, according to the best opinions of learned and careful inquirers,[1] is the origin of popular representation, and of the house of commons itself, the latter constituting, as Macaulay well observes, "the archetype of all the representative assemblies which now meet, either in the old or new world."[2] And for this England and the world are, in a great measure, indebted, as this cursory review shows, to the spirit of independence which animated the towns and cities, and to the pecuniary wants of an enterprising and ambitious monarch.

The political powers thus acquired by towns gave them political importance. This power was courted and controlled by the crown. The king's judges decided that no corporation was valid without the sanction of the king, and most of the corporations from time to time applied to the crown for a grant or confirmation of their privileges. Their dependence upon the crown was thus established, and the crown, as a check upon the nobles, encouraged *popular elections* by the *whole corporate assembly*.[3] In the course of time it was found that these repre-

[1] Hallam's Middle Ages, Vol. III. Chap. VIII.; Hume, England, Vol. I. App. II.; Dr. Adam Smith's Wealth of Nations, Book III. Chap. III., whose account of the condition of the towns and boroughs at this period, and the decay of the power of the lords and the growth of the power of the inhabitants of the cities is, though brief, perspicuous and satisfactory; Norton's Com. Lond. 109. A distinctive feature of *boroughs*, in England, is the right of the borough to elect members of parliament. There the term borough includes cities as well as villages, but in the United States the term borough is not in very general use, and, when used, designates an incorporated village or town, but not a city; American Cyclopedia, Vol. III. 536, *Borough*.

[2] History England, Vol. I. Chap. I.: "The crown! it is the house of commons!" said Mr. Roebuck, in 1858; and the recent history of Great Britain shows that against the declared and positive determination of the commons neither the crown nor the lords, in any struggle relating to popular rights, can make any effectual resistance. And so a close observer of our American institutions will discover that both the senate and the executive, on contested questions, ultimately yield to the controlling power and growing importance of the house of representatives.

[3] An English Municipal Corporation, as will be explained hereafter, consisted usually of one or more select or definite bodies, and an indefinite

sentatives were more formidable to the power of the crown that the nobility had been. In Elizabeth's time compliant judges decided that although the right of election was, by the original constitution or charter, in the whole assembly, still from *usage*, even when within the time of memory, a by-law may be *presumed* giving the right election to a select class (more readily controlled by the crown) instead of the whole body.[1]

Afterwards, to increase the power of the crown, James incorporated towns or boroughs, endowing them with the parliamentary franchise, but confining the exercise of the right to vote to select classes. The immense power of popular representation was a most active agency in the overthrow of Charles I., and the temporary subversion of the throne. This power was inimical to the arbitrary schemes of the Protector, but he expelled the members by violence, and subdued their authority in parliament by force. He then secured this power in his own favor by expelling all hostile magistrates and officers and supplanting them with others of his own creation.

On the restoration, Charles II. commenced his reign by reconstructing the corporations and filling them with his own creatures. Judges, also creatures of the king, holding commissions during his pleasure, aided him in his scheme to acquire absolute control over all of the corporations of the realm. London, as the largest and most influential, was selected as an example, and in 1683 the famous *quo warranto* was issued against the city to deprive it of its charter, for two alleged violations, one of which was stale, and both frivolous. Judgment passed, of course, against the city, and its ancient charter was abrogated.[2] As a condition of its restoration, it was, among other things, provided that thereafter the mayor,

body, the latter being generally composed of the burgesses or citizens; and a Corporate Assembly was a meeting of all the bodies and not of the select or definite bodies alone.

[1] Willcock on Municipal Corp. 8; 3 Hallam's Const. History, 52.

[2] Rex *v.* City of London, Mich. 33 Car. II; 2 Show. 262; Puling's Laws, etc. of London, 14. The history of the seizure of the city franchises, by virtue of the writ of *quo warranto* is given at some length by Norton, Com. on the History, etc. of London, Book I. Chap. XX.; see also *The Case of the City of London*, 8 How. State Trials, 1340, *et seq.*

sheriff, clerk, etc., should not exercise their office without the king's consent; and that if the king twice disapproved of the officers elected by the corporation, he might himself appoint others. In short, the city was deprived of the right of electing its own officers, and made dependent upon the crown. And such was the fate of most of the considerable corporations in England. The whole power was in the hands of the king.[1]

Nor were these arbitrary proceedings confined to England. In 1683 writs of *quo warranto* and *scire facias* were issued for the purpose of abrogating the charter of Massachusetts. Patriotism and religion mingled their fervors and combined in its defence, but in vain. Servile judges, in June, 1684, one year and six days after judgment against the city of London, adjudged the charter to be conditionally forfeited; and the charter government was displaced, and popular representation superseded by an arbitrary commission. In 1687, similar writs wers issued against the charters of Rhode Island and Connecticut; when, as is well known, the people of the latter colony unsuccessfully endeavored to preserve this cherished muniment of their liberties by concealing it in the charter oak. The colonies, as a result of the English revolution of 1688, had their charters restored. Very shortly after the accession of William and Mary, a bill to restore the rights of those English corporations which had surrendered their charters to the crown during the reigns of James II. and Charles II., was introduced into parliament and became a law, with the general applause of men of all parties.[2]

Reference has already been made to the fact that in the time of Elizabeth, the controlling power of corporations was virtually vested in "select bodies." To remedy these and many other abuses, the Municipal Corporation Reform Act (5 and 6 Will. IV. c. 76) was passed. This law sought to restore corporations to their original design, as institutions for

[1] There were eighty-one *quo warranto* informations brought against municipal corporations by Charles II. and James II. 2 Chandl. Com. Debs. 316.

[2] Macauley's History of England, Vol. III. Chap. XV., where a graphic account of the history of its passage is given.

the local government of the place, to be controlled by those interested in it, and not by a favored few. It is undoubtedly true, as remarked by Mr. Hallam, that "No political institution can endure which does not rivet itself to the hearts of men by ancient prejudice or acknowledged interest." That is, it cannot permanently endure, although it may exist long after it ought to cease. If ever an institution outlived its usefulness, — lived long after it became a positive evil — it was the municipal corporations of England, prior to the reform act just mentioned, and which became a law as late as 1835. In many important places in England the number of corporators ranged as low as from ten to thirty. In a large majority of the municipalities, the corporations were close; that is, the governing body had the power to determine who should be admitted to freedom or citizenship; and often the privilege was conferred upon non-residents and the residents excluded. The most important franchise they possessed was that of electing members of parliament, and this, in many places, was the principal function of the corporation. Not only were the councils self-elective, but their tenure was for life. They were frequently controlled by a single party, and all persons entertaining other opinions were of course excluded. The corporations were not in sympathy with, nor did they reflect the wishes of, the people over whom they exercised local jurisdiction. There was no check upon mal-administration. The property was wasted; extravagance characterized the expenditures of money; officers were elected by the irresponsible councils from favoritism or devotion to party.[1] One of the first acts of the Reformed House of Commons was the overthrow, in 1835, of this intolerable system, by the passage of the above-mentioned Municipal Corporations Statute, to which we shall have frequent occasion to refer in the subsequent pages of this work.

Lord Brougham has many titles to the affectionate regard of posterity. Few of his claims are stronger, and none more valid, than those which arise from his faithful and effective services in promoting the reform of the Municipal Corporations of Great Britian, by abolishing these self-elected and

[1] Glover on Corp. XXXVIII. *et seq.*; Report of Commissioners of Corporate Inquiry, 32, *et seq.*

perpetual councils, and by organizing the corporations upon an uniform model, and by establishing in the act the principle that the councils should be selected for short and fixed periods by the votes of the burgesses, thus recognizing and adopting the representative system. Mr. Willcock, in concluding his treatise,[1] had recommended a similar reform, but disclaimed being so visionary as to suppose it would soon be effected, since parliament would not willingly relinquish its influence over venal boroughs, and members elected by corporations would not be allowed by their constituents to abandon their ancient though unjust privileges; but within ten years from the time his language was penned, the reform of which he almost despaired was accomplished.

§ 9. In general, all of our American cities, towns, and counties are public corporations, full or *quasi*. They are created by the legislature and are usually endowed with power to legislate upon, decide, and control local and subordinate matters pertaining to their respective localities. The number and freedom of these local organizations, whereby political power is conferred upon the citizens of the various local subdivisions of a state who have a right to vote and to regulate their own domestic concerns, constitute a marked feature in our free system of government.[2] In general, each road-district, each school-district, each city and each county is, as to local concerns,

[1] Willcock's Municipal Corp. 513, 514. London, with its "great and notable franchises, liberties, and customs," to treat of which, says Lord Coke (4 Inst., 250), "would require a whole volume of itself," was not embraced in the general act of 5 and 6 Will. 4, Chap. 76, but there was subsequently passed an important statute known as the London Corporation Reform Act, of 1849. See Suplement to Puling's Laws, etc., of London.

On the 15th day of August, 1867, after a memorable struggle between the lords and the commons, what is known as the *Disraeli Reform Bill*, became a law by which the right to vote for members of parliament for boroughs was greatly extended.

[2] "In all *quasi* corporations, as cities, towns, parishes, school-districts, membership is constituted by living within certain limits." Per *Shaw*, C. J., Overseers of Poor, etc., *v.* Sears, 22 Pick. 122, 130.

"When a man," says Mr. Justice *Morton*, Oakes *v.* Hill, 10 Pick. 333, 346, "moves into a town, he becomes a *citizen* thereof (if possessed of the requisite qualifications as to age, etc., and if he remains the requisite length of time) whatever may be the desire of himself or the town."

self-governed. These organizations are, of course, subject to the legislature of the state, and their acts, so far as they affect private rights, are also the subjects of judicial cognizance and review. The policy of creating local public corporations for the management of matters of local concern, runs back to an early period in our colonial history, is exhibited in all our legislation, and expressly or impliedly guaranteed in our state constitutions.[1]

The elective franchise in these "local republics" is not, as was the case until recently in England, a privilege dependent upon custom or usage, or confined to certain classes, but is uniform and universal, extending to *all* of the adult male citizens. Old sarums and rotten boroughs, as well as property qualifications, are unknown. The effect of this policy of establishing cities, towns, and districts of country into bodies politic and investing the citizens thereof with the power of self-government, has been most happy.

It has been noticed by Chancellor Kent,[2] that one of the most philosophical and fair of foreign observers[3] was much

[1] Kent Com. 275; Cooley Const. Limit. Chap. 8. See also this learned author's recent opinion in the Supreme Court of Michigan, in the People *v.* Hurlburt, not yet reported (1871). State *vs.* Noyes, 10 Fost. (N. H.) 292; Bow *v.* Allenstown, 34 N. H. 351; Caldwell *v.* Justices, etc., 4 Jones (Nor. Car.) Eq. 323; Comw. *v.* Roxbury, 9 Gray, 503, 510, 511, note, written by Mr. Gray, now one of the justices of the Supreme Judicial Court of Massachusetts; Webster *v.* Hawrington, 32 Conn. 131. In Mr. Quincy's Municipal History of Boston, Chap. I. will be found an interesting historical account of the constitution of towns in Massachusetts, and of their mode of organization and operation — particularly of the town of Boston.

[2] 2 Kent Com. 275, note.

[3] M. De Tocqueville, Democracy in America: "Local assemblies of citizens constitute the strength of free nations. Municipal institutions are to liberty what primary schools are to science; they bring it within the people's reach; they teach men how to use and how to enjoy it. A nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty." M. De Tocqueville's Democracy in America, Chap. V.

"From time immemorial," says one of the ablest of American common law judges, "the counties, parishes, towns and territorial sub-divisions of the country, have been allowed in England, and, indeed, required, to lay rates on themselves for local purposes. It is most convenient that the local establishments and police should be sustained in that manner; and, indeed, to the interest taken in them by the inhabitants of the particular districts,

struck with the institutions of New England towns; and considered them as small independent republics, in all matters of local concern, and as forming the principle of the life of American liberty existing at this day.

The value of our system of municipal institutions, to which we have thus alluded, may be seen on comparing the political condition of the people of the United States with that of the people of modern France—selected as a fair example of a government without municipal freedom. France is a highly centralized government. The state there is everything; the people, nothing. Municipal institutions, with a democratic element, or with the power of independent local self-government, belong, there, to the past. The central power governs and regulates everything. It provides amusements, constructs roads, bridges, internal improvements, controls trade, inspects manufactures. The effects of this system are thus stated: "Develop in the slightest degree a Frenchman's mental faculties, and he flies to a town as surely as steel filings fly to a loadstone. From all parts of France men of great energy and resource struggle up and fling themselves on the world of Paris. There they try to become great functionaries. Through every department of the eighty-four, men of less energy and resource struggle up to the provincial capital. All who have, or think they have, heads on their shoulders,

and the information upon law and public matters generally, thereby diffused through the body of the people, has been attributed by profound thinkers much of that spirit of liberty and capacity for self-government, through representatives, which has been so conspicuous in the mother country, and which so eminently distinguishes the people of America. From the foundation of our government, colonial and republican, the necessary sums for local purposes have been raised by the people or authorities at home. Court-houses, prisons, bridges, poor-houses, and the like, are thus built and kept up, and the expenses of maintaining the poor, and of prosecutions and jurors, are thus defrayed, and of late (in North Carolina), a portion of the common school fund, and a provision for the indigent insane are thus raised, while the highways are altogether constructed and repaired by local labor, distributed under the orders of the county magistrates. When, therefore, the constitution vests the legislative power in the General Assembly, it must be understood to mean that power as it had been exercised by our forefathers, before and after their migration to this continent." Per *Ruffin*, J., in Caldwell *v.* Justices, etc., 4 Jones (N. Car.), Eq. 323, 1858.

struggle into town to fight for office which the government alone can confer. The whole energy and knowledge and resource of the land are barreled up in the towns—all between towns is utter intellectual barrenness."[1]

Such are the withering effects of a centralized despotism.[2] How different with the decentralized system of government in the United States, where each local constituency chooses its own officers—each road-district, school-district, village, town, city, and county administers its own affairs by the people and for the people.[3]

[1] Lond. Morn. Chron. August, 1851.

[2] The foregoing was written prior to the dethronement of Napoleon III. and the communist insurrection. The *commune* movement was but the natural result of a popular uprising against centralized power. But it went to the other extreme, and contemplated, *without a national compact*, a league of 36,000 independent *communes*. Their declared scheme was this: "France shall no longer be one and indivisible, empire or republic; she shall form a federation, not of small states or provinces, but of free cities, linked together *only* so far as shall be consistent with the most absolute decentralization and local government." (*Journal Officiel de la Commune*, April, 1871.) But a scheme which made cities, and not the nation, practically the sovereign, is radically defective, and open to all the objections which M. Mazzini has so forcibly pointed out against it. (Contemporary Review, 1871: reprinted Littell's Living Age, July, 1871, p. 112.)

[3] Barrett *v.* Brooks, 21 Iowa, 144, 151. By constitutional provision in New York, "It belongs, exclusively, to the local power to fill the offices, either by election or appointment, as the legislature may direct." Met. Bd. Health *v.* Heister, 37 N. Y. 661, 667. See also constitution of Illinois, Art. IX. Sec. 5: construed, People *v.* Chicago, 51 Ill. 17, 1869.

Speaking of the power of creating debts and expending money by the city of Philadelphia, under the Consolidation Act of 1854, in a case where it was held that this power had been vested in the legislative department, and not with subordinate officers, *Agnew*, J., observed: "It is manifest that the city government is founded, in its leading thought, upon the American idea of a popular representative government, its immediate prototype being the form of the state government. The right of supervision and control is therefore vested in the councils as the immediate representatives of the popular will, which exerts and enforces its determining power by means of constantly recurring elections. Subject to this primary power the affairs of this people, great in numbers, wealth, intelligence, and influence, are conducted by departments and officers." Philadelphia *v.* Flanigen, 47 Pa. St. 21, 1864.

"What," inquired the Abbe Sieyes, in a book which gave a powerful impulse to the public mind at the beginning of the French revolution of 1789—"What is the *tiers etat?*" And he answered, "Nothing." What

To civil territorial divisions, erected into corporations with defined powers of local administration, and the extension of the right to vote for officers, to all who are to be affected by their action, are due that familiarity with public affairs and that love of liberty and regard for private rights and property, which are characteristic of the best government in Europe, Great Britain, and the best in America, the United States.[1]

But the picture is not without its shadows. There are evils either inherent in our municipal corporations, or which so generally attend their administration as to favor the notion that they are inherent, which have greatly detracted from their value. Some of these may be briefly indicated: 1. Men the *best fitted* by their intelligence, business experience, capacity, and moral character, for local governors or counsellors, are not always, it is feared it might be added, are not generally, chosen. 2. Those chosen are too apt to merge their *individual conscience* in their corporate capacity. Under the shield of their corpor-

ought it to be? "Everything." Thiers's French Rev. Vol. I. p. 27; Guizot Hist. Civ. Lect. VII. On this popular foundation rests not only our national government, but as well all of our state governments and municipal institutions.

[1] After alluding to the antiquity of this system in England, Mr. Justice *Brown*, in the important case of The People *v.* Draper (15 N. Y. 532, 562), says: "Wherever the Anglo-Saxon race have gone, wherever they have carried their language and laws, these communities, each with a local administration of its own selection, have gone with them. It is here that they have acquired the habits of subordination and obedience to the laws, of patient endurance, resolute purpose, and knowledge of civil government, which distinguish them from every other people. Here have been the seats of modern civilization, the nurseries of public spirit, and the centres of constitutional liberty. They are the opposites of those systems which collect all power at a common centre, to be wielded by a common will, and to effect a given purpose, which absorb all political authority, exercise all its functions, distribute all its patronage, repress the public activity, stifle the public voice, and crush out the public liberty." "The city corporations," remarks a modern jurist, "which have grown up in modern times, are of infinite advantage to society; they bind men more closely together than does any other form of political association. But that which most remarkably distinguishes them from the close corporations which formerly existed, is the general spirit of freedom which has been breathed into them. More especially is this the case with town corporations in America, which are as different from those of England as the latter are from similar corporations in Scotland and Holland." Per *Grimke*, J., Rosebaugh *v.* Saffin, 10 Ohio, 31, 36; see also State *v.* Noyes, 10 Fost. (N. H.) 292.

ate character men daily do acts which they would never do as individuals. The public, as if to retaliate, act *towards* corporations in the same spirit. The notion, though not avowed, is by far too much acted upon, that all that can be obtained from a public, or, indeed, from any corporation, is legitimate spoil. Against these, men, usually honest and fair in their dealings, do not scruple to make demands which they would never make against an individual.[1] 3. As a result, the administration of the affairs of our municipal corporations is too often both *unwise* and *extravagant.*

Municipal corporations are institutions designed for the local government of towns and cities; or, more accurately, towns and cities, with their inhabitants, are, for purposes of subordinate local administration, invested with a corporate character. To clothe them with powers to accomplish purposes which can better be left to private enterprise, as, for example, to build markets, is unwise. They should regulate and govern, but not own, them. To invest them with the powers of individuals or private corporations, for objects not pertaining to municipal rule, is to pervert the institution from its legitimate ends, and to require of it duties it is not adapted satisfactorily to execute. Some of the evil effects of municipal rule have arisen from legislation unwisely conferring upon municipalities, at the suggestion, often, of interested individuals or corporations, powers foreign to the nature of these institutions, and not necessary to enable them to discharge the appropriate functions and duties of municipal administration. Among the most conspicuous instances of such legislation, may be mentioned the power to aid in the building of railways, to incur debts, often without any limit, or any which is effectual, and to issue negotiable securities. The result has too often been that debts are incurred so large that they press with disastrous

[1] These effects are not confined to this side of the Atlantic. "It is a familiar fact," says Mr. Herbert Spencer, "that the corporate conscience is ever inferior to the individual conscience — that a body of men will commit, as a joint act, that which every individual of them would shrink from, did he feel personally responsible." Essays, No. VII. p. 261, Am. Ed. 1865; and see, *ib.* Essays, No. V. for a description — perhaps too highly colored — of the unsatisfactory working of the English reformed municipal corporations.

weight on the municipality and its citizens. Extraordinary and extra-municipal powers have been too often incautiously or unwisely granted, and the charters or constituent acts carelessly worded and loosely construed. The remedy suggested by experience consists, in part, in constitutional provisions prohibiting the granting of special charters, and requiring all municipal corporations to be organized under general laws. The legislature should also be prohibited from allowing municipal corporations to engage in extra-municipal projects, or to assist in private enterprises, or to incur debts or levy taxes for such purposes. The powers granted to such corporations, and especially the power to levy taxes, should be more carefully defined and limited, and should embrace such objects only as are necessary for the health, welfare, safety, and convenience of the inhabitants.[2] The amount of indebtedness that may be incurred, even for municipal purposes, should also be limited beyond the power to be evaded.

Experience has also demonstrated the necessity of more power and more responsibility in the executive head of our municipal institutions. Too often the duties of the mayor or executive officer are only nominal, and to these he gives but little attention — a natural result of his want of importance, and of his inability to control the administration of municipal affairs. If the office be clothed with dignity and real author-

[2] "The great increase of corruptions in municipal bodies, growing out of the ability to create, by taxation, a fund which may be squandered, has made many thinking men doubt the wisdom of endowing them with the power;" Mr. Justice *Miller*, in Rusch *v.* Des Moines County, 1 Woolw. C. C. 313, 322, 1868. And note the striking observations of Mr. Justice *Agnew*, on the abuses which attend the administration of finances by municipal bodies and officers, and the too prevalent frauds in the procurement and execution of public contracts; Philadelphia *v.* Flanigan, 47 Pa. St. 21; Hague *v.* Philadelphia, 48 *ib.* 527. In the case first cited, the suggestion of the text as to the wisdom of strictly guarding and limiting the power to create debts, is well enforced by this learned judge. He truly says: "A *valid* contract is uncontrollable; demanding its performance at the hands of the judiciary, and calling to their aid the whole power of the government. If an appropriation for its payment is not made this year, it must be in the next or some following." The gigantic and astounding frauds and corruption which have been recently revealed (1871) in the local administration of the affairs of the great city of New York have awakened public attention to the necessity of more efficient checks upon the misuse of municipal powers.

ity; if the mayor shall be invested with the veto power; if he shall have the sole right to appoint and the unrestricted power to suspend or remove subordinate officials or heads of departments, then the citizens can justly demand of him that he shall be individually responsible for the proper conduct of the concerns of the municipality, and if grievances exist, they will know to whom to apply for remedy, or upon whom to fix the blame.[1]

Municipal corporations, as they exist in this country, it may be further suggested, are of exceedingly complex character. Not here to allude to the legal complexity which arises from

[1] Extended observation of the workings of our municipal institutions has satisfied the author that the views expressed in the text are sound, and he is glad to find them confirmed by the Hon. Josiah Quincy in his "Municipal History of Boston," published in 1852. Mr. Quincy was mayor of the city of Boston from 1823 to 1828, inclusive, and his opinions are entitled to great respect, not only from his known ability, but large experience in municipal affairs. It is interesting to observe the striking coincidence of his views with the recommendations of the "Committee of Seventy," of New York, respecting municipal administration and the importance of efficient executive superintendence, control, and responsibility. Municipal Hist. of Boston, Chap. V. And to same effect is Mr. Charles Nordhoff's interesting article in the *North American Review* for October, 1871, entitled, "The Misgovernment of New York,—A Remedy Suggested." This vigorous writer sketches the defects in the ordinary municipal charters with a masterly hand, and shows great familiarity with the subject of which he treats. Many of his suggestions may be profitably studied by the legislator.

In the *Galaxy* Magazine for February, 1872, the article just mentioned is reviewed by Mr. Isaac Butts, who contends that the only efficient cure for municipal evils is to assimilate local government to that of private corporations, giving the real and ultimate control of all municipal affairs except education and the support of the poor, to the *property* interests of the municipality. He maintains that a "municipality is essentially a moneyed corporation rather than a political community or a diminutive state." He insists that "the basis of municipal authority should be changed in something like the manner following: 1st. Let every person cast one vote, as at present. 2d. In addition to the above, let every person, corporation, and firm, without regard to residence or sex, cast one vote, in person or by proxy, for every $——— for which they respectively were assessed on the last general assessment roll of the city. 3d. A plurality of the aggregate vote to elect."

It may be observed, that in England, under the reformed municipal system, the right to a voice in municipal management is restricted to occupiers of houses and tax-payers, and yet we have, as we have seen, complaints of municipal extravagance, corruption, and abuse.

their *corporate* nature, we may mention that which arises from the exceedingly diverse character of the multiform duties which are confided to their agency and management, requiring the delegation of corresponding powers and provisions for their execution. Some of these powers are civil or political, and not peculiar to the people of the municipality; others are purely local, of which some concern all the inhabitants and some affect only, or mainly, the property owners, on whom, exclusively, the burden of their exercise, or administration, falls. In the ordinary municipal charters, the essential differences between these powers have not been regarded, and, in consequence, *adequate* checks upon their abuse have not been provided.

The *general* right of suffrage will remain, and, in the author's judgment, ought to remain as extensive in the municipality as in the state, and all schemes of municipal reform based upon restricting it are simply impracticable. But if special or extra-municipal powers be granted, not affecting civil, political, or other rights which concern all, but which involve directly the expenditure and payment of money, it is but just that the project should be required to have the support of a majority of those who must pay the expense.

No small proportion of corruption and abuse in municipalities has had its source in their authority to make public and local improvements. The power is usually conferred without sufficient care, and the rights of the property owners (often made liable for the whole cost of the improvement or amount of the expenditure) not sufficiently respected and guarded.

As it is the part of wisdom to organize municipal corporations under *general* laws, so that defects and abuses, being generally seen and felt, will be the more speedily and better remedied by the legislature, so municipal corporations should be shorn of the power to grant special privileges, except under ordinances, general in their character, and which, on equal terms, will make them available to all.

The courts, too, have duties, the most important of which is to require these corporations, in all cases, to show a plain and clear grant for the authority they assume to exercise; *to lean against constructive powers*, and, with firm hands, to hold them

and their officers within chartered limits. But with all the drawbacks we have mentioned (many of which are remediable) our system of popular municipal organization and administration is, beyond controversy, the fairest to the individual citizen, and, on the whole, the most satisfactory in its operations and results of any that has yet been devised. Any other conclusion would be equivalent to admitting that the people are incapable of enlightened self-government; that holders of property ought alone to be respected, and alone be endowed with political and municipal rights; that the few should govern the many, and that our representative system, the flower of modern civilization, based upon the equal right of every man to a voice in the local and general government, is a failure. It is not improbable that we sometimes over-estimate the shortcomings in the practical workings of our municipal system, for the system is an open one, in which all are interested to bring its abuses into the light of day. The fine observation of Lord Bacon fitly applies: "*The best governments are always subject to be like the fairest crystals, wherein every icicle or grain is seen, which in a fouler stone is never perceived.*"

CHAPTER II.

Corporations Defined and Classified.

§ 8. A *corporation* is a legal institution, devised to confer upon the individuals of which it is composed powers, privileges, and immunities which they would not otherwise possess, the most important of which are continuous legal identity and perpetual or indefinite succession, under the corporate name, notwithstanding successive changes, by death or otherwise, in the corporators or members of the corporation. It conveys, perhaps, as intelligible an idea as can be given by a brief definition to say, that a corporation is a *legal person*, with a special name, and composed of such members, and endowed with such powers, and such only as the law prescribes. The most accurate notions of complex subjects come not from definition, but description; and in the course of the present work we shall describe the class of corporations with which it deals, by their creation, constitution, faculties, powers, duties, liabilities, and purposes. Some of the definitions and deductions in the earlier reports amuse by their quaintness, but are without much practical value. "As touching corporations," says Lord Coke, "the opinion of Manwood, chief baron, was this: that they were invisible, immortal, having no conscience or soul; and, therefore, no subpœna lieth against them; they cannot speak, nor appear in person, but by attorney."[1]

Chief Justice *Marshall's* description of a corporation is remarkable for its general accuracy and felicitous expression: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed to be best calculated to effect the object for which it is

[1] 2 Bulst. 233; Willc. Corp. 15.

created. Among the most important are *immortality* [in the legal sense that it may be made *capable* of indefinite duration], and, if the expression may be allowed, *individuality* — properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacy, the hazardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object like one immortal being."[1] Thus, though the members change, the corporation itself remains, in its legal personality, the same, all of its members, past and present, constituting, in law, but one person, in the same manner as the Thames, or the Mississippi, is still the same river, though the parts composing it are constantly changing.[2] The above observations are, in general, applicable to all corporations, private as well as public or municipal.

§ 9. *Municipal corporations* are bodies politic and corporate of the general character above described, established by law, to share in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town, or district which is incorporated.[3] Like other corporations, they

[1] Dartmouth College *v.* Woodward, 4 Wheat. 636, 1819. Other definitions: 4 Black. Com. 37; 1 Kyd Corp. 13; Grant Corp. 3, 4; Angell & Am. Corp. Sec. 1; Glover Corp. 3, 6. Willcock declines to define, but decribes corporations: Munic. Corp. 15. The last author observes that "A corporation continues the same body politic from its creation to its dissolution, unaltered by the revolution of ages or the successive changes of its members, so that it is unnecessary to make grants to them and their successors, or to declare their obligations binding on their successors." *Ib.* 16; Glover, 8; Grant, 5; 7 Vin. Abr. 358, 363.

[2] Glover, 8; 1 Black. Com. 468.

[3] "A body politic," says Lord Coke, "is a body to take in succession, framed as to its capacity by policy, and therefore is called by Littleton (Sec. 413) *a body politic;* it is called a *corporation*, or *body corporate*, because the persons are made into a body, and are of a capacity to take, grant, &c., by a

must be created by law. They possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them, or other statutes applicable to them. Persons residing in or inhabiting a place to be incorporated, as well as the place itself, are — both *the persons* and *the place* — indispensable to the constitution of a municipal corporation. Artificial succession, also, is of the essence of such a corporation. Municipal corporations are created and exist for the public advantage, and not for the benefit of their officers or of particular individuals or classes. The corporation is the artificial body created by the law, and not the officers, since these are, from the lowest up to the councilmen or mayor, the mere ministers of the corporation. Even the council, or other legislative or governing body, constitutes, as it has been well remarked, neither *the* corporation, nor in themselves *a* corporation.[1] It is quite impossible, in any brief space, to convey an adequate idea of the exact nature and properties of a municipal corporation. There is nothing in the law more complex and abstruse. Although the inhabitants of a place be incorporated, they do not constitute the corporation; neither, as we have just observed, is it constituted by the governing body. Notwithstanding Mr. Kyd's criticism, the corporation is *invisible*, for, although we may see all the inhabitants, or all of the officers, we do not see the legal body which makes the corporation as we see an army; but this is a property common to all corporations. An additional complexity in municipal corporations arises out of the various and diverse powers usually conferred, giving them an extremely composite character. The primary and fundamental idea of a municipal corporation is an agency to regulate and administer

particular name. Viner's Abr. Corp (*a* 2). A *municipal corporation* is also defined to be "An investing the people of a place with the local government thereof." Salk. 183. "This latter description," says Mr. Justice *Nelson*, in The People *v.* Morris, 13 Wend. 325, 334, 1835, "is the most appropriate, and is justified by the history of these institutions, and the nature of the powers with which they were, and are, invested." It is also quoted by *Campbell*, C. J., in The People *v.* Hurlburt, Supreme Court of Michigan, November term, 1871, not yet reported.

[1] Reg. *v.* Paramore, 10 Ad. & El. 286; Reg. *v.* York, 2 Q. B. 850; Grant, 357; Glover, 4; Harrison *v.* Williams, 3 Barn. & Cress. 162.

the internal concerns of a locality in matters peculiar to the place incorporated, and not common to the state or people at large; but it is the constant practice of the states to make use of the incorporated instrumentality, or of its officers, to exercise powers, perform duties, and execute functions not strictly or properly local or municipal in their nature, but which are, in fact, state powers, exercised by local officers, within defined territorial limits; and it is important, as we shall hereafter see, to keep this distinction in mind. In theory, the two classes of powers are distinct; but the line which separates the one from the other is often very difficult to trace. The point may be illustrated from the English law: If the king incorporate a town, its officers will have no implied power as conservators or justices of the peace; express words are necessary to confer this power, and when they act in the latter capacity, it is not because they are corporate officers, but because of powers expressly annexed to their corporate offices, and the two capacities remain distinct, although united in the same person.[1] The subject itself will be elsewhere discussed. The *name* of the municipal corporation, its *boundaries*, *its officers*, *its powers*, *its duties*, and the like, are subjects regulated by legislative enactment, and will be hereafter noticed.

§ 10. Corporations intended to assist in the conduct of local civil government are sometimes styled *political*, sometimes *public*, sometimes *civil*, and sometimes *municipal*, and certain kinds of them with very restricted powers — *quasi* corporations — all these by way of distinction from *private* corporations. All corporations intended as agencies in the administration of civil government, are *public*, as distinguished from *private* corporations. Thus an incorporated school-district, or county, as well as city, is a public corporation; but the school-district or county, properly speaking, is not, while the city is, a *municipal* corporation. All municipal corporations are public bodies, created for civil or political purposes; but all civil, political or public corporations are not, in the proper use of language, municipal corporations. The phrase Municipal Corporations,

[1] 1 Kyd, 327; People *v.* Hurlburt, Supreme Court of Michigan, 1871, not yet reported, per *Campbell*, C. J.

in the contemplation of this treatise, has reference to *incorporated villages, towns and cities*, as distinguished from other public corporations, such as counties and *quasi* corporations.[1]

[1] Hamilton Co. *v.* Mighels, 7 Ohio St. 109, 1857.

The distinction, as it is usually drawn between *municipal corporations* proper, such as chartered towns and cities, or towns and cities voluntarily organized under general incorporating acts, such as exist in a number of the states, and *involuntary quasi corporations*, such as counties, is clearly set forth in the carefully prepared opinion of *Brinkerhoff*, J., delivering the judgment of the Supreme Court of Ohio in the case just cited. "Municipal corporations proper" he observes, "are called into existence, either at the direct solicitation or by the free consent of the persons composing them, for the promotion of their own local and private advantage and convenience." On the other hand, "Counties are at most but local organizations, which, for the purposes of civil administration, are invested with a few functions characteristic of a corporate existence. They are local sub-divisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former (municipal) organization is asked for, or at least assented to, by the people it embraces; the latter organization (counties) is superimposed by a sovereign and paramount authority.

A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are in fact, but a branch of the general administration of that policy." The learned judge, adverting to the case in hand in which it was sought to make the county liable in damages to one who suffered a personal injury from the neglect of the commissioners of the county in the discharge of their official duties, says: "But, it is said, the members of the board of county commissioners are chosen by the electors of the county, and hence the board is to be regarded as the *agents of the county*, for whose torts, in the performance of official duties, the county ought to be responsible. True, the people of the county elect the board of county commissioners; but they also elect the sheriff and treasurer of the county. Are the people of the county, therefore, responsible for the malfeasances in office of the sheriff or for the official defalcations of the county treasurer? This will not be pretended. * * * * * * We cannot but think that county commissioners are not agents or representatives of the county in any such sense or manner as to render the people of the county justly answerable for their neglect; even if the neglect be such as would create a civil liability against a natural person or a municipal or private corporation." "It is," he adds, "undoubtedly competent for the leg-

Civil corporations are of different *grades or classes*, but in essence and nature they must all be regarded as public. The school-district or the road-district is invested with a corporate character the better to perform within and for the locality its special function, which is indicated by its name. It is but an instrumentality of the state, and the state incorporates it that it may the more effectually discharge its appointed duty. So with counties. They are involuntary, political, or civil divisions of the state, created by general laws to aid in the administration of government. Their powers are not uniform in all of the states, but these generally relate to the administration of justice, the support of the poor, the establishment and repair of highways, all of which are matters of state, as distinguished from local concern. They are purely auxiliaries

islature to make the people of a county liable for the the official delinquencies of the county commissioners; but this has not yet been done, and we think such liability cannot be derived from the relations of the parties, either on the principles or the precedents of the common law." See also Soper *v.* Henry Co. 26 Iowa, 264, 1868; Treadwell *v.* Commissioners, 11 Ohio St. 190; Angell & Ames, Secs. 14, 23, 24, 25.

Speaking of the powers of *school-districts* and of their officers, *Bell*, J., in Harris *v.* School District, 8 Foster, N. H. 58, 61, 1853, observes: "These little corporations have sprung into existence within a few years, and their corporate powers and those of their officers are to be settled by the constructions of the courts upon a succession of crude, unconnected, and often experimental, enactments." "School districts," he further remarks— referring to those in New Hampshire —"are *quasi* corporations of the most limited powers known to the laws. They have no powers derived from usage. They have the powers expressly granted to them, and such implied powers as are necessary to enable them to perform their duties, and no more. Among them is the power to vote money for specified purposes, and the power to appoint committees 'to carry their votes' relative to those purposes 'into effect.' The district may clearly, by their votes for building and repairing school-houses, limit the expense to a definite sum; and they may limit the precise repairs or the exact description of the school-house to be built, and when this is done the *committee* (appointed to 'carry the votes into effect') cannot bind the district by exceeding those limits. These committees are special agents without any general powers over the affairs of the district, and their powers are confined to a special purpose; and no inference can be drawn from the general nature of their powers. The liability of such powers to abuse, furnishes the strongest arguments against their existence," as a committee might load the district with debts, though the district had expressly limited their authority. See also Wilson *v.* School Dist. 32 N. H. 118, 1855; Foster *v.* Lane, 10 Foster, 305, 315; Giles *v.* School Dist. 11 Fost. 304.

of the state; and to the general statutes of the state they owe their creation, and the statutes confer upon them all the powers they possess, prescribe all the duties they owe, and impose all liabilities to which they are subject. Considered with respect to the limited number of their corporate powers, the bodies above named rank low down in the scale or grade of corporate existence; and hence have been frequently termed *quasi* corporations. This designation distinguishes them on the one hand from private corporations aggregate, and on the other from municpal corporations proper, such as cities or towns acting under charters or incorporating statutes, and which are invested with more powers and endowed with more functions and a larger measure of corporate life. It will appear hereafter that many of the courts have drawn a marked line of distinction between municipal corporations and *quasi* corporations, with respect to their liability to persons injured by their neglect of duty; holding the former liable, without an express statute giving the action, in cases in which the latter are not considered liable unless made so by express legislative enactment. One reason often given for the distinction is, that with respect to local or municipal powers proper (as distinguished from those conferred upon the municipality as a mere agent of the state) the inhabitants are to be regarded as having been clothed with them at their request and for their peculiar and special advantage and that as to such powers and the duties springing out of them, the corporation has a *private* character, and is liable, on the same principles and to the same extent as a private corporation. This subject will be fully examined in its appropriate place, and is only alluded to here for the purpose of noting the distinction which has been made between municipal and other public corporations. But that a municipal corporation is in any just view a private corporation, or possesses a double character, the one private and the other public, although often asserted, is only true, if true at all, in a very modified, if not inaccurate, sense. In their nature and purposes, municipal corporations, however numerous and complex their powers and functions, are essentially public.

§ 11. *The New England Town.* — In the New England states, public corporations have, in many respects, a peculiar character. In some instances, there are acts incorporating *cities*, giving them defined powers and providing a special mode of government; but even then the general laws in relation to *towns*, when not inconsistent with the provisions of the local act, ordinarily apply to the places specially incorporated. In the New England *town* proper, the citizens administer the general affairs in person, at the stated corporate or town meetings, and through officers elected by themselves.[1] The towns are charged with the support of schools, the relief of the poor, the laying out and repair of highways, and are empowered to preserve peace and good order, maintain internal police, and direct and manage generally, in a manner not repugnant to the laws of the state, their prudential affairs; and for defraying these and all necessary and lawful charges, they may levy and collect taxes. Speaking generally, the New England towns are organized after the same model; and a correct notion of their character will be best obtained by reference to the leading statutory provisions in Massachusetts respecting them, given in the note.[2] The town in New

[1] In *towns*, according to the use of the word in the New England states and some of the others, the citizens administer the general affairs in person, in town meetings. In *cities*, this is done by means of a mayor, aldermen, and council, to whom the citizens entrust most of the legislative and executive powers of the place. State *v.* Glennon, 3 Rh. Is. 276, 278, *per Staples*, C. J. In New England, "town" is a generic term, and it will embrace *cities*, unless the contrary appears in other parts of the statute to have been the intent of the legislature. *Ib.*

[2] Summary of the leading statutory provisions in *Massachusetts* respecting towns: —

1. *As to powers and duties.*—They are "*bodies corporate*, with all the powers heretofore exercised by them, and subject to all the duties to which they have heretofore been subject." Genl. St. 1860, Ch. XVIII. Sec. 1. "Towns may, in their corporate capacity, sue and be sued in the name of the town." *Ib.* Sec. 8. They may hold real estate and personal property "for the public use of the inhabitants," and also "in trust for the support of schools and the promotion of education within the limits of the town." *Ib.* Sec. 9. They "may make *contracts* necessary and convenient for the exercise of their corporate powers," and may dispose of their *corporate property*. *Ib.* Secs. 8, 9. "They may, at legal meetings, grant and vote such sums as they judge necessary, for the following purposes: For the

England, while somewhat anomalous, has some of the usual powers of a regular municipal corporation, and some of the characteristics of the county organizations in many of the states. The New England *town* affords, perhaps, an example of as pure a democracy as anywhere exists. All of the qualified inhabitants meet and directly act upon and manage, or direct the management of, their own local concerns. This form of government was adopted from a very early period, and is firmly adhered to and deeply cherished by the people of the New England states. The result has demonstrated how well adapted it is to promote the well-being of the communities that for so long a space of time have thus governed themselves. The remarkable growth and prosperity of the New England states, not the most favored by nature, and the intelligence and character of the people, are facts known to all; and it is not strange that these results should be attributed, in a large measure, to this system of local popular gov-

support of town *schools;* for the relief, &c., and employment of the *poor;* for the laying out and discontinuing and repair of *highways;* for procuring the writing and publishing of *town histories;* for *burial grounds;* for encouraging the destruction of *noxious animals;* for all other *necessary charges* arising therein." *Ib.* Sec. 10. "May make necessary *by-laws,* not repugnant to the laws of the state, for directing and managing the prudential affairs, preserving the peace and good order, and maintaining the internal police thereof." *Ib.* Sec. 11. But such by-laws must, before taking effect, be approved by the Superior Court, or, in vacation, a judge thereof. *Ib.* Sec. 14. They are binding upon all within the limits of the town, strangers as well as inhabitants. *Ib.* Sec. 15.

2. *Corporate or Town Meetings.*—"Every male citizen of twenty-one years of age and upwards (except paupers, &c.), who has resided within the state one year, and within the town in which he claims the *right to vote,* six months, and who has paid a state or county tax, &c., shall have a right to vote upon all questions at all meetings for the transaction of town affairs, and no other person shall be entitled to vote." *Ib.* Sec. 19. "The annual meeting of each town shall be held in February, March, or April; and other meetings at such time as the selectmen may order." *Ib.* Sec. 20. Warrants issue for all meetings, under the hands of the selectmen, directed to constables or others, who notify such meeting in the manner prescribed by the by-laws or vote of the town. *Ib.* Sec. 21. "The warrant shall express the *time and place of* the meeting, and the *subjects* to be there acted upon;" * * * "and nothing acted upon shall have a legal operation unless the subject matter thereof is contained in the warrant." *Ib.* Sec. 22. If selectmen unreasonably refuse to call a meeting, any justice of the peace may do so upon the application of ten or more legal voters of the town.

ernment. But, in the course of time, many of the towns, or portions thereof, grew to be large and populous, and the system of meetings of the electors, in their original capacity, became inconvenient and almost impracticable. When the population of a town or place exceeds eight or ten thousand persons, the need for the representative system is urgently felt. Accordingly, in the New England states, there are now, in addition to towns, a large number of incorporated *cities*, with charters or constituent statutes, organized upon the usual representative model, with a legislative or governing body, and an executive head and subordinate officers. The people of the large city of Boston, in particular, were wedded to the town system, and struggled long against the change to the representative plan; and five successive times between 1784 and 1821 rejected well-considered schemes for a city government. The town continued to be governed by meetings of the electors *en masse*, acting through boards and officers,

Ib. Sec. 23. Provision is made for moderating and conducting the meeting. *Ib.* Secs. 25–30. *Town officers* are elected at the annual meeting, who serve for one year, and until others are chosen and qualified. These consist of selectmen, assessors, treasurer, constables, who are *ex-officio* collectors unless others be specially chosen; field drivers, fence viewers, surveyors of lumber, measurers of wood, unless selectmen appoint, "and all other usual town officers." *Ib.* Sec. 31. Then follows a variety of provisions respecting the duties of these several officers, and the manner of their performance. In addition, there are acts incorporating and establishing cities. "The laws in relation to towns, where not inconsistent with the general or special provisions of the acts establishing cities, apply to them; and cities are subject to the liabilities, and city councils have the powers of towns. The mayor and aldermen shall have the powers and be subject to the liabilities of selectmen, &c., if no other provisions are made in relation thereto." General St. 1860, Ch. XIX. 166. "The marked and characteristic distinction between a *town* organization (in Massachusetts) and that of a *city* is, that in the former all of the qualified inhabitants meet, deliberate, act, and vote in their natural and personal capacities; whereas, under a city government, this is all done by their representatives." *Per Shaw*, C. J., in Warren *v.* Charlestown, 2 Gray, 84, 101. As to the *origin and power* of towns in Massachusetts, consult Commonwealth *v.* Roxbury, 9 Gray, 451, 1857, opinion of *Shaw*, C. J., 476, and the valuable note of Mr. (since Judge) Gray, pp. 503, 528; Quincy's Munic. Hist. of Boston, Ch. I.; *ante*, Chapter I. Towns were not expressly authorized *to sue* and be sued until 1694, nor formally incorported until 1785. *Ib.* 9 Gray, 511, note "G;" 2 Dane's Ab. 698; Willard *v.* Newburyport, 12 Pick. 227, 231; Spaulding *v.* Lowell, 23 Pick. 77, 78.

until the place had forty thousand inhabitants, of whom *seven* thousand were qualified voters. In 1822, however, the legislature, at the desire of a majority of the voters, granted the place a city charter, by which it was provided that the control of its affairs should be in a mayor and city council. After this, other towns, from time to time, made the change from the town to the city plan; so that, as before observed, we have in the New England states both modes of local administration. The town system is the general one; the city, or representative system, is the exceptional one, and is confined to places of compact population and considerable size.[1]

[1] No city was incorporated in Massachusetts until after the amendment of the constitution of that state in 1820. *Per Shaw*, C. J., in Warren *v.* Charlestown, 2 Gray, 84. After referring to the previous attempts in 1784, 1785, 1791, 1804, and 1815, to change the town government of Boston, Mr. Josiah Quincy, in his Municipal History of Boston, p. 28, continues: "In 1821, the impracticability of conducting the municipal interests of the place, under the form of town government, became apparent to the inhabitants. With a population upwards of forty thousand, and with seven thousand qualified voters, it was evidently impossible calmly to deliberate and act. When a town meeting was held on any exciting subject, in Faneuil Hall, those only who obtained places near the moderator could even hear the discussion. A few busy or interested individuals easily obtained the management of the most important affairs, in an assembly in which the greater number could have neither voice nor hearing. When the subject was not generally exciting, town meetings were usually composed of the selectmen, the town officers, and thirty or forty inhabitants. Those who thus came were, for the most part, drawn to it from some official duty or private interest, which when performed or obtained, they generally troubled themselves but little, or not at all, about the other business of the meeting. In assemblies thus composed, by-laws were passed, taxes, to the amount of one hundred or one hundred and fifty thousand dollars, voted, on statements often general in their nature, and on reports, as it respects the majority of voters present, taken upon trust, and which no one had carefully considered except, perhaps, the chairman. In the constitution of the town government there had resulted, in the course of time, from exigency or necessity, a complexity little adapted to produce harmony in action, and an irresponsibility irreconcilable with a wise and efficient conduct of its affairs. On the agents of the town there was no direct check or control; no pledge for fidelity but their own honor and sense of character. The prosperity of the town of Boston, under such a form of government; the few defalcations which had occurred; the frequent, and often, for years, uninterrupted, re-election of the same members to the officiating boards, are conclusive evidence of the prevailing high state of morals and intelligence among the inhabitants." After referring to the different boards

§ 12. The *character of towns* in New England, and in what respects they differ from English Municipal Corporations, existing by prescription or special charter, prior to the legislation by parliament in 1835, before mentioned,[1] and the care to

among which the executive power was divided, and which acted independently of each other, and which were invested with the expending power, and, in effect, with exercise of the whole power of taxation, Mr. Quincy proceeds: "A conviction of the want of safety and of responsibility in a machine thus complicated and loosely combined, became, at length, so general that the inherited and inveterate antipathy to a city organization began perceptibly to diminish. About this time, also, one of the most common and formal objections to a city organization was removed. The constitution of Massachusetts, which was passed in 1780, contained no express authority to establish a city organization; and, in every attempt to change that of the town, it never failed to be zealously contended that the legislature of the commonwealth possessed no such power. But by the amendments to the constitution, made by the convention of 1820, and adopted by the people, this power was expressly recognized. The question, therefore, now stood on its own merits, and independent of constitutional objections. The debates, also, which occurred in this convention had a tendency to open the eyes of the inhabitants to their own interests, and to allay some of the long-cherished prejudices against a city organization." In 1821 the people voted to make the change, and measures were immediately taken to obtain the sanction of the legislature. The legislature, on the 23d day of February, 1822, passed "An act establishing the city of Boston," commonly called "the city charter." The following is a brief outline of the principal features of this charter, taken from Quincy's Municipal History of Boston, p. 41: 1. The title of the corporation to be, "The City of Boston." 2. The control of all its concerns is vested in a mayor, a board of aldermen, consisting of eight, and common council, of forty-eight inhabitants, to be called, when conjoined, "The City Council." 3. The city to be divided into twelve wards. The mayor and aldermen and common council to be chosen annually, by ballot, by and from inhabitants; four of the common council from and by those of each of the wards. 4. The city clerk to be chosen by the city council. 5. The mayor to receive a salary. His duty—to be vigilant and active in causing the laws to be executed; to inspect the conduct of all subordinate officers; to cause carelessness, negligence, and positive violation of the laws to be prosecuted and punished; to summon meetings of either or both boards; to communicate and recommend measures for the improvement of the finances, the police, health, security, cleanliness, comfort, and ornament of the city. 6. The mayor and aldermen are vested with the administration of the police and executive power of the corporation generally, and with specific enumerated powers. 7. All other powers belonging to the corporation are vested in the mayor, aldermen, and common council, to be exercised by concurrent vote.

[1] *Ante*, Chap. I.; *post*, Chap. III.

be observed in applying the English cases relating to such corporations to municipal corporations in this country, are well set forth by the learned Chief Justice *Perley*, in delivering the opinion of the Supreme Court of New Hampshire, in an important case to which we shall again have occasion to allude.[1] He says: "It is to be observed that municipal corporations in England are broadly distinguished in many important respects from towns in this and the other New England states. There is no uniformity in the powers and duties of English municipal corporations. They were not created and established under any general public law, but the powers and duties of each municipality depended upon its own individual grant or prescription. Their corporate franchises were held of the crown by the tenure of performing the conditions upon which they had been granted, and were liable to forfeiture for breach of the conditions. They indeed answered certain public purposes, as private corporations do which have public duties to perform, and some of them exercised political rights. But they are not like towns (with us) general, political and territorial divisions of the country, with uniform powers and duties, defined and varied, from time to time, by general legislation. Towns (in New England) do not hold their powers ordinarily under any grant from the government to the individual corporation; or by virtue of any contract with the government, or upon any condition, express or implied. They give no assent in their corporate capacity to the laws which impose their public duties or fix their territorial limits." And referring to the case then before the court, he added: "In all that is material to the present inquiry, municipal corporations in England bear much less resemblance to towns in this country than to private corporations which are charged with the performance of public duties, and for these reasons the English authorities on the subject are but remotely applicable to the present case."

§ 13. The *distinctive character* of the New England towns, and particularly the limited nature of their powers, will be further seen by a brief glance at the course of judicial decis-

[1] Eastman *v.* Meredith, 36 N. H. 284, 290, 1858.

ions with respect to their authority to make contracts and to obtain revenue. Money can only be raised by them for the purposes expressed by the statute, and for expenses incident to such purposes. The power of the majority is wisely limited by law to the objects and cases which are clearly provided for and defined by statute.[1]

[1] Stetson *v.* Kempton, 13 Mass. 272, 1816; Parsons *v.* Goshen, 11 Pick. 396, 1831. "This limitation," says Mr. Justice *Wilde*, with great truth, in the case last cited, "upon the power and authority of towns to enter into contracts and stipulations, is a wise and salutary provision of law, not only as it protects the rights and interests of the minority of the legal voters, but as it may not unfrequently prove beneficial to the interests of the majority, who may be hurried into rash and unprofitable speculations by some popular or delusive excitement, to the influence of which even wise and considerate men are sometimes liable. A town in its corporate capacity will not be bound, even by the express vote of the majority, to the performance of contracts or other legal duties, not coming within the scope of the objects and purposes for which they are incorporated." Anthony *v.* Adams, 1 Met. 284, 286, 1840, *per Shaw*, C. J.; quoted and followed in Vincent *v.* Nantucket, 12 Cush. 105, 1853. See also Norton *v.* Mansfield, 16 Mass. 48; Dill *v.* Wareham, 7 Met. 438, 1844 (contract by the town, undertaking to transfer the right of taking oysters within its limits).

Whether towns in *Massachusetts* are authorized under the statute to make any contract for the payment of money, which they are not authorized to raise money to discharge by a tax on the inhabitants, does not seem to be settled by express adjudication. Bancroft *v.* Lynnfield, 18 Pick. 566, 1836, *per Shaw*, C. J.; Tash *v.* Adams, 10 Cush. 252, 1852.

"The inhabitants of every town in this state" — Maine — says *Shepley*, C. J., in Hooper *v.* Emery, 14 Maine, (2 Shep.) 375, 1837, "are declared to be a body politic and corporate by the statute: but these corporations derive none of their powers from, nor are any duties imposed upon them by, the common law. They have been denominated *quasi* corporations, and their whole capacities, powers, and duties are derived from legislative enactments." See also Pittson *v.* Clark, 15 Maine, 460, 463; Augusta *v.* Leadbetter, 16 Maine, 45, 1839; Estes *v.* School Dist. 33 Maine, 170, 1851; Mitchell *v.* Rockland, 45 Maine, 496, 504, 1858; Salem Mill Dam *v.* Ropes, 6 Pick. 23, 32; School Dist. etc., *v.* Wood, 13 Mass. 193, 1816, *per Parker*, C. J.; Mower *v.* Leicester, 9 Mass. 247, 250, 1812.

Where the legislature has prescribed the purposes for which money may be raised by taxation, it cannot be raised for other and distinct purposes. Nor when it is raised and collected for authorized and proper purposes can it be appropriated to, or expended upon other and different, objects. This would be to break down and defeat the limitation. Hence towns cannot give away or distribute *per capita* or otherwise, money collected by taxation. Hooper *v.* Emery, 14 Maine (2 Shep.), 375, explaining Ford *v.* Clough, 8 Greenl. 334; Davis *v.* Bath, 17 Maine, 141, 1840; Pease *v.* Cornish, 19 Maine

Thus a town, under a statute which restricts them to raising money to provide for "the poor, for schools, for the support of public worship, and *other necessary* changes," cannot raise money, even in the time of war, and when the town is in immediate danger from the enemy, for the payment of additional wages to the drafted and enlisted militia, and for other purposes of defence. This is not a *corporate* duty, but the duty of the general government.[1] Nor can it appropriate money, contract for, or levy a tax to aid in the construction of a road, which, by law, is to be made at the expense of the *county*, and not the town.[2] A town may, it is said, raise money to meet ordinary expenditures, such as the payment of officers, the support and defence of actions, the expenses incident to discharging duties imposed by law, looking to the safety and convenience of the citizens. Thus it can erect a town or city hall, or market house, but not a theatre, a circus, or any place of

(1 Appl.), 191, 1841; Stetson *v.* Kempton, 13 Mass. 272; Dillingham *v.* Snow, 5 Mass. 547; Spaulding *v.* Lowell, 23 Pick. 71, 1830; Woodbury *v.* Hamilton, 6 Pick. 101; Cooley *v.* Granville, 10 Cush. 56.

The *Vermont* statute respecting the powers of towns is nearly a transcript of that of Massachusetts. The Supreme Court of Vermont approves of the exposition of the statute given by the Supreme Court of Massachusetts in Willard *v.* Newburyport, 12 Pick. 230; Allen *v.* Taunton, 19 Pick. 485; Torry *v.* Milbury, 21 Pick. 64; Spaulding *v.* Lowell, 23 Pick. 71; Hardy *v.* Waltham, 3 Met. 163, *per Isham*, J., in Van Sicklen *v.* Burlington, 27 Verm. (1 Wms.) 70. For discussion of powers and duties of *selectmen* and digest of previous decisions in *New Hampshire*, see Carleton *v.* Bath, 2 Fost. (N. H.) 559. Have no *general* authority to bind the town by contract. Andover *v.* Grafton, 7 N. H. 300; but are confined to such acts as are necessary to the discharge of their duties. Sanborn *v.* Deerfield, 2 N. H. 253. Cannot, *ex-officio*, adjust controversies or suits, or release a cause of action; Carlton *v.* Bath, 2 Foster, 559. May indemnify town officers in proper cases; 12 N. H. 278. But there is no promise *implied* in law against a town to indemnify selectmen in any case, for damages which they have been compelled to pay, arising out of the discharge of official duty; 35 N. H. 189. Are suppposed to be liable to the corporation for gross neglect of official duty; Sanborn *v.* Deerfield, 2 N. H. 253, by *Woodbury*, J.

[1] Stetson *v.* Kempton, 13 Mass. 272, 1816, where the phrase, *necessary town charges*, is construed by *Parker*, C. J.; and see comment of *Shaw*, C. J., 12 Pick. 227, 230, and 23 Pick. 74; and of *Dewey*, J., in Allen *v.* Taunton, 19 Pick. 485, 487; 18 *ib.* 566, 10 Cush. 57.

[2] Parsons *v.* Goshen, 11 Pick. 396, 1831; Anthony *v.* Adams, 1 Met. 284, 1840.

mere amusement, nor even a statue or monument, unless in populous and wealthy towns, as suitable ornaments to public buildings or squares.[1] So towns may provide for the support of a public clock, hay scales, burying ground, wells, reservoirs, and many other like objects which relate to the accommodation and convenience of the inhabitants, and which have been placed under the municipal jurisdiction of towns by statute or by usage.[2]

§ 14. Although not styled such, *each one of the United States*, in its organized political capacity, is in effect a public corporation. Corporations, however, as the term is commonly used, does not include states, but only derivative creations, owing their existence and powers to the state acting through its legislative department. Like corporations, however, a state, as it can make contracts and suffer wrongs, so it may, for this reason, and without express provision, maintain, in its corporate name, actions to enforce its rights and redress its injuries.[3] But a state is not liable to be sued without its consent:[4] although it is not unusual for states, by special enactment, to authorize suits to be brought against them, but, as the permission is voluntary, they may prescribe the terms, and, unless it impairs the obligation of contracts, may withdraw the consent at pleasure.[5] A devise to a state for any object which it

[1] Stetson *v.* Kempton, 13 Mass. 272, 1816, *per Parker*, C. J.; Allen *v.* Taunton, 19 Pick. 485, 487, opinion by *Dewey*, J., as to power of towns in Massachusetts; Spalding *v.* Lowell, 23 Pick. 71, opinion of *Shaw*, C. J., on same subject.

[2] Willard *v.* Newburyport, 12 Pick. 227, 230, 1831.

[3] Delafield *v.* Illinois, 2 Hill (N. Y.), 159, 162; 26 Wend. 192, 1841; affirming, S. C. 8 Paige, 531; Indiana *v.* Woram, 6 Hill (N. Y.), 33, 1843; these cases hold that states may sue as plaintiff in the *state* courts; State *v.* Delesdenier, 7 Texas, 76; People *v.* Assessors, 1 Hill, 620. The governor of a state, as the head of the executive department, is a corporation sole, and bonds made payable to him may be enforced for the benefit of those interested. Governor *v.* Allen, 8 Hump. (Tenn.), 176, 1847; Polk, Governor, *v.* Plummer, 2 *ib.* 500.

[4] Briscoe *v.* Bank, 11 Pet. 257, 321.

[5] Beers *v.* Arkansas, 20 How. 527, 1857; Dodd *v.* Miller, 14 Ind. 433; Auditor *v.* Davies, 2 Pike (Ark.), 494; Ellis *v.* State, 4 Ind. 1; State *v.* Trustees, 5 Ind. 77. The supreme court of the United States has original jurisdiction in cases in which a state shall be a party, as also in suit between states; Kentucky *v.* Dennison, 24 How. 66.

may properly aid or provide for, is valid.[1] Extended consideration of the powers of the states, and of their relation to the United States and to each other, is not within the scope of the present work, which is limited strictly to municipal corporations.

[1] McDonough Will Case, 15 How. 367, 382, 1853.

CHAPTER III.

Creation, and Several Kinds of Municipal Corporations.

In England. — Difference between Regal and Parliamentary Corporations. — Municipal Corporations Act of 1835.

§ 15. In England, corporations can only be *created* in one of two ways: 1, by the king's charter; 2, by act of parliament. They *exist* there, however — 1, by the common law; 2, by prescription; 3, by royal charter; 4, by authority of parliament. Corporations at *common law* are those which derive their existence and powers from immemorial usage, although they may have had their origin in an act of parliament or royal grant, no longer discoverable. Those by *prescription* pre-suppose a grant by charter or act of parliament, which has been lost. Into corporations created by regal or legislative grant may be resolved what have been styled corporations by *implication*, which is, where a body, lawfully constituted, cannot carry into effect its purposes without attributing to it a corporate character. The franchise of being a corporation, and the right to exercise corporate powers and to enjoy corporate privileges, can be claimed in no other way than as above stated. A legal sanction to the corporate character is, therefore, absolutely necessary, and is always implied.[1] The distinction between corporations deriving their existence from the king's charter and those which derive their existence from parliament is important. A royal charter is a written instrument, in the form of letters patent, under the great seal, addressed to all the subjects of the realm, containing a grant, by the crown, to the persons named, of the franchises, powers, and privileges therein mentioned. A *charter of incorporation*, therefore, is the written instrument by which the king creates the corporate body,

[1] Willc. 21; Glover, 23; Grant, 6, 7; 1 Kyd, 39; Angell & Am. Sec. 69; Bro. Corp. 65; Eastman *v.* Meredith, 36 N. H. 284, 290, 1858, per *Perley*, C. J.; St. Louis *v.* Allen, 13 Mo. 400; Same *v.* Russell, 9 *ib.* 503.

names it, defines its objects, and confers its powers. Unless restricted in the charter, all of the common law incidents of a corporation attach to it, but no corporation can pursue objects not warranted by its charter. The charter is the organic act which gives to the corporation both its existence and its peculiar character.

The king's charter may confer upon the corporation it institutes all the usual and ordinary powers of a corporate body, but it cannot invest such a body with extraordinary powers, such as proceeding in a manner different from the common law, or punishing by forfeiture or imprisonment, or conferring an *exclusive* right of trading. When the king grants clauses which are illegal, they are void, and if clearly illegal and not confirmed by parliament, no length of time or usage will make such clauses valid. But parliament, in the fullness of its power, may grant to corporations which it erects such powers, ordinary and extraordinary, as it deems proper; and it may do, as indeed it has often done, confirm clauses in royal charters which were void, because beyond the king's power to grant.

The king cannot incorporate a body of men *without their assent.* Until his charter has been accepted, it is inoperative. When once accepted, the acceptance is irrevocable. The acceptance must be by those to whom it is addressed; and it is held that a valid acceptance may be made by a majority of the grantees. The charter must be accepted *in toto*, or not at all, for there can be no partial acceptance without the assent of the crown, which must be shown by matter of record. If the corporation be a new one, acceptance of part of the charter is taken as acceptance of all. Acceptance may be shown by user — by acting under it, as well as by the formal action of the corporate body. After acceptance, the *crown cannot resume the grant*, or dissolve or destroy the corporation, without the consent of the grantees or their successors. The crown, at common law, can create a corporation for municipal government in any place where there is not, at the time, an existing corporation of the same kind, but there cannot be, concurrently, two corporations, for the same place, having the same or similar powers or jurisdiction. But these limitations upon the power of the crown do not apply with respect to municipal

corporations *created by parliament.* Its power is, legally speaking, illimitable. It may create, and abolish, and change, at its pleasure, with or without the assent of the people or corporation to be thereby affected. It may change royal charters, but parliamentary corporations cannot be affected, without the consent of parliament, by charters granted by the crown. Except as to the extent of powers which may be conferred, a parliamentary corporation is, at common law, similar to that which is created by the crown.[1]

§ 16. Prior to 1835, many of the towns, boroughs, and cities of England were incorporated in one of the ways mentioned; that is to say, there were in them bodies corporate, established for the local government thereof. There was no uniformity in the constitution or powers of these corporate bodies. The corporation proper was not the town or place, but *a corporate body constituted within it*, with powers and jurisdiction, more or less extensive, to govern the inhabitants. These bodies were established at different times, and with different motives. The first distinct recognition of a municipal corporation was in the 18th of Henry VI. (A. D. 1439), with reference to Kingston-upon-Hull, which had an express charter of incorporation granted to it, for the first time, in that year. Charters had previously been granted to it by different sovereigns, at various times, giving it various privileges, but they did not *incorporate* the place, nor was it incorporated until the charter of 18th Henry VI., which is the first that uses terms of incorporation.[2] Subsequently such corporations were erected from time to time, each with its peculiar constitution, depending on the provisions of the charter or prescriptive usage. The constitution of the corporations was so various, and is so different from the American model, that it requires care to obtain an accurate idea of it. For illustration, we will take a simple form, viz.: where by charter or prescription the corporation consists of the

[1] Authorities last cited. Respecting the authority of the crown to grant charters to incorporate towns, since the General Municipal Corporations Act of 1835, see Rutter *v.* Chapman, 8 M. & W. 1; Reg. *v.* Boucher, 3 Q. B. 654.

[2] Glover, 16.

mayor, aldermen, and commonalty of a town. Here there are three ranks, classes, or parts: 1, the mayor or head officer; 2, the aldermen, the number of whom is definite, being fixed by the charter, or by prescriptive usage; 3, the commonalty, that is, the common freemen, whose number is indefinite, and whose rights, in the course of time, were largely usurped or destroyed. These three classes were denominated the *integral parts* of the corporation, and no corporation was complete (except it be otherwise provided by the charter) unless the mayor, or head officer, a majority of the definite class (that is, a majority of the aldermen), and some members of the indefinite class, or commonalty, be in existence. Hence, during a vacancy in the office of mayor, no valid corporate act can be done except to elect another, since without a mayor the corporate body is incomplete. Hence, also, at every corporate meeting it was essential, at common law, that there should be present the mayor, or head officer, whose duty it was to preside, a majority of each definite integral class, and some members of each indefinite class, if there be more than one such class.

In the course of time great abuses had crept into these bodies, which parliament had frequently been obliged to redress. Complaints of grievances were universal, and misrule, confusion, and internal disputes so general that the municipal system of government fell into great and deserved disrepute. As a measure of reform, the Municipal Corporations Act of 5 and 6 Will. IV. Chap. LXXVI. was devised and enacted.[1]

[1] The reformed house of commons presented an address to William IV. requesting the appointment of a commission to inquire into the state of the municipal corporations in England and Wales. The commission which was appointed made a thorough examination of the condition of the various boroughs, and their report disclosed abuses and defects which it seems marvellous that any spirited people so long endured. See Chapter I. *ante*, Sec. 8.

From various sources of information the commission ascertained the existence of two hundred and forty-six corporations, in England and Wales, exercising municipal functions. The population of these corporate places exceeded two millions of people. Some of these corporations claimed to act under prescriptive custom, but most of them under several charters, forming a continued series from a very early date, but generally under charters granted from the reign of Edward I. down to the reign of George

"I cordially concur," said the king, from the throne, "in this important measure, which is calculated to allay discontent, to promote peace and union, and to procure for those communities the advantages of responsible government." This act organizes all of the municipal corporations of England and Wales upon a uniform model. It does not altogether destroy their previously existing lawful corporate powers, but it does sweep away all laws, statutes, charters, and usages inconsistent with or contrary to its provisions. It defines who shall be burgesses or citizens, making the right essentially depend upon occupancy of houses or shops within the borough, and the payment of taxes for the relief of the poor. These bur-

IV. inclusive. The number of corporators stated to be definite, in fifty boroughs, varied in most cases from under ten to thirty, and those indefinite, in one hundred and sixty-two boroughs, varied from twelve to five thousand, but usually averaged from fifty to two hundred corporators. The titles to *freedom*, or citizenship, generally comprehended those arising from birth, servitude, marriage, purchase, gift, or election. The governing bodies were formed by the close and corrupt system of *self-election*, in a great majority of the municipalities. The corporate officers, such as the mayor, or other head of the corporation, the recorder—frequently unprofessional—and the town clerk, were appointed by the self-elected governing body from its own immaculate conclave. Most of the municipalities possessed exclusive *criminal jurisdiction*, extending to the trial of felonies and all other offences, whereas many appear never to have had any criminal jurisdiction. Several *boroughs* had civil jurisdiction extending to the decision of all actions; some extending to the decision of personal and mixed actions; others to the decision of personal actions; while in a great number, no civil jurisdiction appeared ever to have existed. *The property*, in some few boroughs, was trivial, but the revenue generally averaged from 500*l* to 1,000*l* in each, while in some the property exceeded 50,000*l* per annum. In a few towns corporate, the accounts were printed for distribution and audited publicly; but in most cases, the accounts were neither duly kept, nor audited, nor published, besides being inaccurate and in a generally unsatisfactory state. The annual income of these municipal corporations amounted to about 366,000*l*, and the expenditure to 377,000*l*, while the debt in one hundred and thirty-three exceeded the sum of two millions sterling. Throughout the course of the investigation of the commissioners there were perceptible the same complaints—of magistrates ill qualified, by education and habits, for their situations, generally partial, and sometimes corrupt; of courts, which might be made the instruments of much local advantage, falling into disuse through defects of their original constitution and their recent mal-administration; of juries improperly selected by reason of notorious party bias; of revenue misapplied; of debt contracted and of property alienated; of the absence of all accounts and

gesses or citizens elect, from time to time, a fixed number of proper persons to be councillors, and the council (composed of the mayor, aldermen, and councillors) elect, from qualified persons, the aldermen, and also the mayor and the ministerial and inferior corporate officers. "*The council*" is the governing body of the corporation, and its most important powers are defined by various acts of parliament. It will

the denial of all accountability by certain corporations; of the insufficiency of the police, the neglect of paving and lighting, and the want of those municipal accommodations for which the public property committed in trust to the corporation would, if duly administered, be amply sufficient to provide. Having given a general view of the ordinary constitution of the various municipalities, the commissioners next proceeded to specify some of their defects. The most common and most *striking defect* in the constitution of the municipal corporations was, that the *corporate bodies existed independently of the communities among which they were found.* The corporators looked upon themselves, and were considered by the inhabitants, as separate and exclusive bodies; they had powers and privileges within the towns and cities from which they were named, but, in most places, all identity of interest between the corporation and the inhabitants disappeared. That was the case even where the corporation included a large body of inhabitant freemen. It appeared in a more striking degree as the powers of the corporation had been restricted to smaller numbers of the resident population, and still more glaringly when the local privileges had been conferred on *non-resident freemen*, to the exclusion of the inhabitants to whom they rightfully ought to belong. The privilege of electing *members of parliament* being that which, before the passing of the reform act, conferred upon the self-elected governing bodies of close corporate towns their principal importance, and the rewards for political services which the patron was accustomed to distribute among them, caused this function to be considered, in many places, as the sole object of their institution. The power so monopolized and employed in a mode unsuitable to the altered circumstances of the times, led to various abuses of the system. The custom of keeping the number of corporators as low as possible, may be referred to the wish for preserving the parliamentary franchise, rather than to the desire of monopolizing the municipal authority, which had been coveted only as a means of securing the other and more highly prized privilege. A great number of corporations was preserved solely as *political engines*, and the towns to which they belonged derived no benefit, but often much injury, from their existence. To maintain the political ascendancy of a party, or the political influence of a family, was the one end and object for which the powers entrusted to a numerous class of these bodies have been exercised. This object was systematically pursued in the admission of freemen, resident or non-resident; in their election of municipal functionaries for the council or the magistracy; in the appointment of subordinate officers and the local police; in the administration of charities

thus be perceived that the original power is in the burgesses or citizens, and that the act adopts the representative system, and proceeds upon the idea that a substantial interest in the incorporated place, which is made necessary in order to be a

entrusted to the municipal authorities; in the expenditure of the corporate revenue; and in the management of the corporate property. The most flagrant abuses arose from this perversion of municipal privileges to political objects. Thus the inhabitants had to complain, not only that the election of their magistrates and other municipal functionaries was made by an inferior class of themselves, or by persons unconnected with the town, but also of the disgraceful practices by which the magisterial office was frequently obtained; while those who, by character, residence, and property, being best qualified to direct and control its municipal affairs, were excluded from any share in the elections or management. The exclusive and party spirit belonging to the whole corporate body, appeared in a still more marked manner in the councils by which, in most cases, it was governed. These councils were usually *self-elected*, and held their offices *for life*. They were commonly of one political party, and their proceedings were mainly directed to secure and perpetuate the ascendancy of the party to which they belonged. Individuals of adverse political opinions were, in most cases, systematically excluded from the governing body. These councils, which embodied the opinions of a single party, were entrusted with the nomination of magistrates, of the civil and criminal judges, often of the superintendents of police, and were, or ought to have been, the leaders in every measure that concerned the interests and prosperity of the town. So far from being the representatives either of the population or of the property of the town, they did not represent even the privileged class of freemen; and being elected for life, their proceedings were unchecked by any feeling of responsibility. In conclusion, the commissioners reported that there prevailed amongst the inhabitants of a great majority of the incorporated towns a general and a just dissatisfaction with their municipal councils, whose powers were subject to no proper control, whose acts and whose proceedings being secret, were unchecked by the influence of public opinion; a distrust of the municipal magistracy, tainting with suspicion the local administration of justice, and often accompanied with contempt of the persons by whom the law was administered; a discontent under the burdens of local taxation, while revenues that ought to be applied for the public advantage were diverted from their legitimate use, and sometimes wastefully bestowed for the benefit of individuals, sometimes squandered for purposes injurious to the character and morals of the people. The commissioners therefore felt it their duty to represent to his majesty, that the municipal corporations of England and Wales neither possess nor deserve the confidence or respect of his majesty's subjects, and that a thorough reform must be effected before they can become, what they ought to be, useful and efficient instruments of local government. Glover's Historical Summary of the Corporate System of Great Britain and Ireland, pp. 38 to 45. The result was the Municipal Corporations Act of 5 and 6 Will. IV. Chap. LXXVI.

burgess or citizen, will induce care in the selection of councillors, and that frequent elections will prove the most effectual check on those entrusted with the administration of the municipal authority, which is carefully limited and defined.

The act of 1835, with some amendments, constitutes the body of the existing English municipal corporations system, and its leading provisions are so important to be understood in the study and application of the English cases to questions arising in this country, and contain so much of interest to the lawyer, the legislator, and the municipal inquirer, that they are given or referred to in the note.[1]

[1] *Municipal Corporations Act of* 5 *and* 6 *Will.* IV. *Cap.* 76, *passed September* 9, 1835.— NAME, &c.— This act commences by reciting, that "Whereas, divers bodies corporate at sundry times have been constituted within the cities, towns, and boroughs of England and Wales, to the intent that the same might forever be and remain well and quietly governed; and it is expedient that the charters by which said bodies corporate are constituted, should be altered in the manner hereinafter mentioned; be it therefore enacted, that so much of all laws, statutes, and usages, and so much of all royal and other charters, now in force, relating to the several boroughs named in schedules (A and B) annexed, as are inconsistent with, or contrary to, this act, *shall be*, and the same are hereby, *repealed and annulled*" (Sec. 1), with the reservation of certain rights, beneficial exemptions, and franchises to the freemen or citizens (Secs. 2–5). These schedules contain an alphabetical list of all the incorporated boroughs, with the number of wards, number of aldermen, and number of councillors, and style of the corporate body in each; thus: "*Bath* — Seven wards, fourteen aldermen, forty-two councillors." *Corporate Name* — "Mayor, Aldermen, and Citizens of the City of Bath." If it be a borough instead of a city, the word "Burgesses" is used instead of "Citizens." The act provides that the body corporate in each of said places "shall take and bear the name of the Mayor, Aldermen, and Burgesses [or Citizens, in case of a city] of such borough, and by that name shall have perpetual succession, and shall be capable in law, *by the council* hereinafter mentioned of such borough to do," &c. (Sec. 6).

MEMBERSHIP.— Before the passage of the act under consideration, the qualifications for members or officers of municipal corporations depended upon the charter, usage, or by-laws of the particular corporation — the usual qualifications being that the person claiming to be admitted to the freedom of the corporate town should be the son of a freeman, or should have served an apprenticeship to a freeman, or (in some instances) married his daughter, or acquired the privilege by gift or purchase; but this act provides that hereafter "no person shall be elected, made, or admitted a burgess or freeman of any borough by gift or purchase" (Sec. 3). It fixes the *qualifications of burgesses or citizens*, thus: "Every male person, of full age, who shall have occupied any house, warehouse, counting-house, or shop, within any borough" for three years, "and during the time of such occupation been

In the United States.

§ 17. The proposition which lies at the foundation of the law of corporations in this country is, that here, all corporations, public and private, exist and can exist only by virtue of express *legislative enactment*, creating, or authorizing the creation, of the corporate body. Legislative sanction is absolutely essential to lawful corporate existence. That a corporation may here exist by prescription, and its existence be established by long and undisputed user of corporate powers may (as the cases hereafter referred to will show) be true, but this prescription and user suppose a legislative grant. Instances of pre-

an inhabitant householder within the borough, or within seven miles of the borough, shall, if duly enrolled, *be a burgess of such borough and a member of the body corporate of the mayor, aldermen, and burgesses of such borough*, provided he shall have been rated in respect to the premises so occupied by him to all rates made for the relief of the poor within the parish" (Sec. 9). Such resident occupiers and tax-payers, only, are members of the corporate body of the place; all the other inhabitants are no part of the municipal corporation, though subject to its government.

COUNCILLORS, HOW CHOSEN, &c.—Upon the first day of November, in every year, the *burgesses* so enrolled in every borough *shall openly assemble*, and elect from the persons *qualified to be councillors* [who must have the qualifications of a burgess, and also increased pecuniary and rating qualifications], the councillors of the borough" (Sec. 30), of whom one-third part go out of office annually. The elections are held before the mayor and assessors, and the mode of voting (which is exactly the opposite of the ballot in America) is by delivering to the officers of election a voting-paper containing the name and abode of the person voted for, and signed with the name of the voter. It is thus seen that the burgesses elect the councillors, whose qualifications are fixed by the statute, and whose number in each incorporated place is definite.

ALDERMEN, HOW CHOSEN.— On the ninth day of November, in every third succeeding year, the council, for the time being, are directed to elect, "*from the councillors, or from persons qualified to be councillors*, the aldermen of the borough," who are one-third in number of the councillors (Sec. 25). The manner of election is prescribed, namely, by every member of the council delivering to the mayor, or chairman, a voting-paper signed by the member voting, which the mayor, or chairman, is directed openly to read. (Act 7 Will. IV. and 1 Vict. Chap. LXXVIII. Sec. 14; 16 and 17 Vict. Chap. LXXIX. Sec. 13.)

MAYOR, HOW CHOSEN.— At the meeting of the council, to be held on the ninth day of November, each year, the council are directed to *elect, out of the aldermen or councillors*, a fit person to be the *mayor*, who shall continue in office for one year (Sec. 49) and until his successor shall have accepted and qualified (6 and 7 Will. IV. Chap. CV. Sec. 4).

scriptive corporations, with us, are rare and exceptional. But corporations, public and private, by virtue of direct legislative authorization, are being created in such vast numbers as to constitute one of the most marked and important features of the present age. Speaking of "corporations by statute," in England, Mr. Willcock says that "the legislature has not often exercised the power of creating municipal corporations, because it has been esteemed a flower of the prerogative." [1] This

WHO COMPOSE THE COUNCIL, &c.— The mayor, the aldermen, and the councillors, for the time being, constitute "*the council*" of the borough (Sec. 25). The council, as we have seen, elect the mayor and the aldermen, and it also appoints the clerk, treasurer, and other corporate officers. The corporate body acts by and through the council, who have the authority of the old corporations, except as modified. Provision is made for the stated and special meetings of the council; the notice prescribed, the quorum fixed; the presiding officer defined, &c., &c. Power is given to make by-laws, and the powers of the council defined, and provision is made for powers vested in trustees, under sundry local acts of parliament, for paving, lighting, supplying with water or gas, cleansing, watching, regulating, or improving, or for providing or maintaining a cemetery or market in the boroughs being transferred to the body corporate of the borough (Sec. 75, 20 and 21 Vict. Chap. L.). By other acts of parliament the boundaries of boroughs are fixed (6 and 7 Will. IV. Chap. CIII. 1836); the "administration of the borough fund" regulated (*ib.* Chap. CIV); "the administration of justice" provided for (*ib.* Chap. CV.; 13 and 14 Vict. Chap. XCI.); borough rates regulated (7 Will. IV. and 1 Vict. Chap. LXXXI. 1837; 2 and 3 Vict. Chap. XXVIII.; 3 and 4 Vict. Chap. XXVIII.; 4 and 5 Vict. Chap. XLVIII.; 5 and 6 Vict. Chap. XCVIII.;) power to sell and mortgage property and to charge rates given (5 and 6 Vict. Chap. XCVIII.; 23 and 24 Vict. Chap. XVI.); provision made as to maintaining bridges (13 and 14 Vict. Chap. LXIV. 1850); to promote public libraries (18 and 19 Vict. Chap. LXX. 1855; 29 and 30 Vict. Chap. CXIV.); in relation to the police (19 and 20 Vict. Chap. LXIX.; 27 and 28 Vict. Chap. LXIV.; 28 and 29 Vict. Chap. XXXV.); the management of highways, by enabling councils to adopt parish roads and apply their funds to their repair (25 and 26 Vict. Chap. LXI.); for safe keeping of petroleum (25 and 26 Vict. Chap. LXVI.); for the protection of gardens and ornamental grounds (26 and 27 Vict. Chap. XIII.); in relation to prisons (28 and 29 Vict. Chap. CXXVI. known as "The Prisons Act, 1865;" 29 and 30 Vict. Chap. C.). A variety of other statutes, of less importance, in relation to municipal corporations, have been passed since the general act of 1835, some amendatory of it and some making new and additional provisions. By the famous Disraeli reform bill of 1867, the right to vote for a member, or members, to serve in parliament for boroughs was extended to large numbers or classes of persons who did not before possess the franchise. New American Cyclopedia, 1868, p. 327.

[1] Willc. 25.

has reference to a period anterior to the famous Municipal Corporations Act of September 9, 1835 (5 and 6 Will. IV. Chap. LXXVI.), by which parliament undertook the regulation of this important subject.[1] The existing law of corporations is essentially of modern growth, and has yet largely to be developed and settled. Having occasion to refer to this subject in a recent case in Illinois, a distinguished judge said: "Formerly but few private corporations were created, and these cut so small a comparative figure in the destinies of states, that they attracted but little attention on the part of law makers, and were but little studied by the courts. Even in England, until a very recent period, both public and private corporations were created by royal prerogative, without the intervention of parliament, and were invested with such powers and privileges as favorites might ask, or the public good be supposed to require. But even then such corporations were rare. Now they have become among the greatest means of state and national prosperity. It is probably true, that more corporations were created by the legislature of Illinois, at its last session, than existed in the whole civilized world at the commencement of the present century. This state of things has necessarily led to a more careful study of the whole subject, both by legislators and the courts.[2] Not only are commercial or business corporations being thus multiplied, but municipal corporations, in all of the states, are constantly created and universally adopted as part of the ordinary machinery of government, so that it is rare to find a town or city of any size not incorporated and invested with the power of local government. There are in the United States thousands of incorporated places acting under special charters granted by the states or general incorporation acts passed by them.

§ 18. The power of *congress* to create or authorize the creation of corporations, public or private, whenever these become an appropriate means of exercising any of the constitu-

[1] *Ante*, Sec. 16, p. 51.

[2] *Per Caton*, J., Railroad Co. *v.* Dalby, 19 Ill. 353, 1857. See, also, similar observations of *Rogers*, J., in Bushnell *v.* Insurance Co. 15 Serg. & Rawle, 176, 177.

tional powers of the general government, or of facilitating its lawful operations in the states or territories, must be taken to be conclusively settled by the supreme court.[1] This power has been exercised on important occasions, such as incorporating the banks of the United States, the national banks, and the Pacific railroad company, and, within the above limitations, it is no longer disputed. Congress habitually passes acts for the organization of territories and territorial governments, which are, in substance and effect, municipal corporations on a large scale and of a peculiar character; but it is not within the power of congress to establish ordinary municipal corporations within the limits of the states, and it has never attempted to exercise it.

In a territorial organic act, a provision that the power of the territorial legislature "shall extend to all *rightful subjects of legislation*," authorizes the legislature to create municipal corporations, and to invest them with the power to make ordinances, and to provide corporation courts in which to enforce them. And such courts may be provided, although by the organic act it is declared that the *judicial power* of the territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace.[2]

[1] McCullough *v.* Maryland, 4 Wheat. 316; Osborn *v.* Bank of U. S. 9 *ib.* 738; Thompson *v.* Pacific Railroad Co. 9 Wall. 579; Pacific Railroad *v.* Lincoln Co. 1 Dillon, C. C. 314, 1871.

[2] State *v.* Young, 3 Kansas, 445, 1866; Burnes *v.* Achison, 2 *ib.* 454; S. P. Reddick *v.* Amelia, 1 Mo. 5, 1821. In this case the objection made was, that such a legislature was not sovereign, and that nothing short of sovereign power could create a corporation. The answer given was, that congress could give, and had given, the power to legislate on such subjects. That a territorial legistature, vested with general legislative powers, may create a corporation, which is not affected by the subsequent adoption of a state constitution, was held in Vincennes University *v.* Indiana, 14 How. 268, 1852. See, also, Vance *v.* Bank, 1 Blackf. (Ind.) 80; Myers *v.* Bank, 20 Ohio, 283.

It is now provided by act of congress, "That the legislative assemblies of the several territories of the United States, shall not, after the passage of this act, grant private charters or especial privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits." March 2, 1867, 14 Stats. at Large, 426, Sec. 1.

§ 19. In this country, until comparatively a recent period, municipal corporations have been created singly, each with its special or separate charter passed by the legislature of the state. These charters, in all of the states, were framed after the same general model, but in the extent of the special powers conferred, and in the peculiar constitution of the governing body, and the like, there was great variety. It will be useful to notice the outline features of one of these charters, since it constitutes the organic act of the corporation, and bestows upon it its legal character. Such a charter usually sets out with an incorporating clause declaring, "that *the inhabitants*[1] of the town of (naming it), or city of (naming it), are hereby constituted a body politic and corporate by the name and style of the 'town of ——,' or 'city of ——,' and by that name shall have perpetual succession, may use a common seal, sue and be sued, purchase, hold, and sell property," &c. The charter then defines the *territorial boundaries* of the town or city thus incorporated. After that follow provisions relating to the governing body of the corporation, usually styled the town or city *council*. This is generally composed of one body, though in some instances, of two; the members being called aldermen, councilmen, or trustees. The corporation is divided into *wards*, and each ward elects one or more aldermen, the number being specified and definite. The qualifications of the voters are fixed by the charter, which are, usually, that the voter shall be a male citizen of the United States and of the state, be of age, and a resident, for a specified time, within the limits of the corporation. The mode of holding elections

[1] In public corporations, as cities, towns, parishes, school districts, membership is constituted by living within certain limits, whatever may be the desire of the individual thus residing or that of the municipal or public body. In private corporations, on the other hand, especially those organized for pecuniary profit, membership is constituted by subscribing to or receiving, with the assent of the corporation, when that is necessary, transfers of its stock. Overseers of Poor, &c., *v.* Sears, 22 Pick. 122, 130, *per Shaw*, C. J.; Oakes *v.* Hill, 10 Pick. 333, 346, *per Morton*, J.; *ante*, p. 17, and notes. It is the citizens or inhabitants of a city, not the common council or local legislature, who constitute the "corporation" of the city. The officers of the council and other charter officers are the agents or officers of the corporation. Lowler *v.* Mayor, &c., of N. Y. 5 Abbott's Pr. R. 325; Clarke *v.* Rochester, 24 Barb. 446, 1857.

is specified; and the power is often given to the council to canvass returns, and to settle disputed elections to corporate offices. Provision is made for the election of a mayor, or other chief executive officer of the corporation, and his duties defined. The charter contains a minute and detailed enumeration of the powers of the city council, which are usually numerous; the most important of which are, the authority to create debts (sometimes restricted); to levy and collect taxes within the corporation, for corporate purposes; to make local improvements and assessments to pay therefor; to appoint corporate officers; to enact ordinances to preserve the health of the inhabitants, to prevent and abate nuisances, to prevent fires, to establish and regulate markets, to regulate and license given occupations, to establish a police force, to punish offenders against ordinances; to open and grade and improve streets; to hold corporation courts, &c., &c. When it is remembered that the charter of such a corporation is its constitution, and gives it all the powers it possesses (unless other statutes are applicable to it), its careful study, in any given case, is indispensable to an understanding of the nature of the powers it confers, the duties it enjoins, and liabilities it creates. The construction of its various provisions, and the determination of the relation which these bear to the general statutes of the state; how far the charter controls, or how far it is controlled by, other legislation, are among the most difficult questions which perplex the lawyer and the judge. The study of a question of corporation law begins with the charter, but it must, oftentimes, be pursued into the general statutes and legislative policy of the state, and after this into the broad field of general jurisprudence.

§ 20. Within a period comparatively recent, the legislatures of a number of the states, following the example of the English Municipal Corporations Act of 5 and 6 Will. IV. Cap. LXXVI. heretofore mentioned, have passed *general acts* respecting municipal corporations. These acts abolish all special charters, or all with enumerated exceptions, and enact general provisions for the incorporation, regulation, and government of municipal corporations. The usual scheme is to

grade corporations into classes, according to their size, as into Cities of the First Class, Cities of the Second Class, and Towns, or Villages, and to bestow upon each class such powers as the legislature deems expedient; but the powers and mode of organization of corporations of each class are uniform.[1] General incorporation acts, rather than special

[1] *Ohio.*—By the Towns', Cities', and Villages' Act of May 3, 1852 (Swan's Stat. 954), all corporations existing for the purposes of municipal government are thereby organized into *cities* and *incorporated villages.* (Sec. 1.) In respect to the exercise of certain corporate powers, municipal corporations are divided into classes, thus: 1. Cities of first class, which comprise all cities having a population exceeding twenty thousand inhabitants; 2. Cities of the second class, which comprise all cities not embraced in the first class; 3. Incorporated villages; and 4. Incorporated villages for special purposes. *Ib.* Sec. 39 *et seq.* These are "declared to be bodies politic and corporate, under the name and style of the city of ——, or the incorporated village of ——, as the case may be; capable to sue and be sued, to contract and be contracted with, to acquire, hold, and possess property, real and personal, to have a common seal, and to exercise such other powers, and to have such other privileges, as are incident to municipal corporations of like character or degree, not inconsistent with this act or the general laws of the state." *Ib.* Sec. 18. These powers and privileges are then specified with great minuteness, twenty sections of the act being devoted to this purpose. Incorporated villages are governed by one mayor, one recorder, and five trustees, elected annually; the mayor, recorder, and trustees constituting the village council, any five of whom make a quorum. *Ib.* Sec. 43. The corporate authority of cities is vested in the mayor, one board of trustees (two from each ward), and who compose the city council, together with such other officers as are mentioned in the act, or as may be created under its authority. *Ib.* Sec. 52 *et seq.*

"The governing all cities and villages under one general law, was a new experiment, supposed to be required by the present constitution. It was to be expected, that, in the working of the experiment, omissions, if not mistakes, would be discovered, to be corrected by additional legislation. It will be a work of care and time to perfect an orderly and harmonious system." *Per Gholson*, J., in Thomas *v.* Ashland, 12 Ohio St. 124, 130, 1861.

Iowa.—The Ohio act is, in substance, adopted in Iowa. Revision 1860, Chap. LI. But it does not apply to cities having special charters, unless adopted by them. Burke *v.* Jeffries, 20 Iowa, 145.

In *Tennessee* (Acts 1849, Chap. 17) provision is made by general act for the incorporation of towns, cities, and villages. The constitution of Tennessee declares, that "The legislature shall have power to grant charters of incorporation as they may deem expedient for the public good." Art. XI. Sec. 7. In the State *v.* Armstrong, 3 Sneed, 634, it was held, that the act of 1856, by which full power to *create corporations*, and determine the extent of their powers, was given to the Circuit Courts, was unconstitu-

charters, would seem clearly to be the best method of creating and organizing municipal corporations. 1. It tends to prevent favoritism and abuse in procuring extraordinary grants of special powers. 2. It secures uniformity of rule and construction. 3. All being created and endowed alike, real wants are the sooner felt and provided for, and real grievances the sooner redressed.

tional, on the ground that the legislature could not delegate its authority to the courts. But in the Mayor, &c. *v.* Shelton, 1 Head, 24, 1858, it was held, that the act of 1849—which was a general statute for the incorporation of towns and cities, and by which a petition was to be presented by the inhabitants of a place proposing to organize under the act, to the County Court, which had power simply to record the petition and designate the boundaries of the corporation—was not in conflict with the constitution, as the statute, and not the court, determined the extent and nature of the powers of the corporation.

Missouri.—A general act for the incorporation of towns was passed in Missouri in 1845, and it was held not unconstitutional by reason of certain duties which it imposes on the County Court with reference to organization of towns under the act, as these duties are not legislative but judicial, and the law itself, and not the court, declares the powers of which the corporation shall be possessed. Kayser *v.* Trustees, &c. 16 Mo. 88, 1852.

Indiana.—The general law of 1857, for the incorporation of cities, is not unconstitutional for want of *uniformity* in the mode of their organization. Lafayette *v.* Jenners, 10 Ind. 70, 80, 1857. See also Welker *v.* Potter, 18 Ohio St. 85.

Pennsylvania.—A general act was passed in 1851, designed to form a system for the regulation of boroughs incorporated *thereafter*. Comw. *v.* Montrose, 52 Pa. St. 391.

North Carolina.—By general act, every incorporated town may elect, each year, not less than three, nor more than seven, commissioners, who are a body corporate and the governing body of the town. These commissioners are elected by the vote of the citizens of the place. At the same time they are also to elect a mayor, who presides at the meetings of the commissioners, but who has no vote except in case of a tie. The mayor is both a peace officer and a judicial officer, with the same jurisdiction as a justice of the peace, with power also to "hear and determine all cases that may arise upon the ordinances of the commissioners," &c. The commissioners may levy certain specified taxes, and make ordinances in relation to their officers, records, markets, nuisances, the repair of streets and bridges in the town, &c., &c. These general provisions apply to all incorporated towns when not inconsistent with special charters or acts in reference thereto. Rev. Code 1854, Chap. III. p. 586.

New York.—In this state there are cities with local and special charters, and also towns whose powers, duties, and privileges are particularly prescribed by statute. Each town is a body corporate for specified purposes;

By Implication.

§ 21. It is well settled in England that, while a corporation must commence or be instituted by the proper authority, yet no fixed, prescribed, or precise form of words is necessary, in order to create a corporation. While the words "to found," "to erect or establish," or "to incorporate," are commonly used to evince the intention to erect or create a body politic, they are not necessary.[1] The king grants a charter to the men of Dale, that they may annually elect a mayor, and plead and be impleaded by the name of the mayor and commonalty. This is considered to be sufficient to incorporate them.[2] So a grant by a charter containing no *direct clause* of *incorporation* to the inhabitants of a town "that their town shall be a *free*

but it is declared that "No town shall possess or exercise any corporate powers except such as are enumerated in this chapter, or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or given." Rev. Sts. part I. Chap. XI. p. 337, Secs. 1, 2. "The several towns in this state," says *Denio*, J., in Lorillard *v.* The Town of Monroe, 11 N. Y. (1 Kern.), 392, 1854, "are corporations for certain special and very limited purposes, or, to speak more accurately, they have a certain limited corporate capacity. They may purchase and hold lands within their own limits for the use of their inhabitants. They may, as a corporation, make such contracts and hold such personal property as may be necessary to the exercise of their corporate or administrative powers, and, as a necessary incident, may sue and be sued, where the assertion of their corporate rights, or the enforcement against them of their corporate liabilities, shall require such proceedings. (1 R. S. 337, Sec. 1 *et seq.*) In all other respects—for instance, in everything which concerns the administration of civil or criminal justice, the preservation of the public health and morals, the conservation of highways, roads, and bridges, the relief of the poor, and the assessment and collection of taxes—the several towns are political divisions, organized for the convenient exercise of portions of the political power of the state, and are no more corporations than the judicial, or the senate and assembly districts. *Ib.* Sec. 2. The functions and duties of the several town officers respecting *these subjects*, are judicial and administrative, and not in any sense corporate functions or duties," and hence, as to *such subjects*, the towns as corporations are not liable for any default or malfeasance of these officers. See, as to the corporate capacity of towns in New York, Denton *v.* Jackson, 2 Johns. Ch. R. 320; North Hempstead *v.* Hempstead, 2 Wend. 109; affirming S. C. Hopk. 288; Cornell *v.* Guilford, 1 Denio, 510.

[1] 10 Co. 27 *a*, 28 *a*, 29 *b*, 30; 1 Kyd, 62; 2 Kent Com. 27.

[2] 21 Edw. IV. 56. The doctrine of a corporation by implication originated in the time of Edward IV. *Ib.* 8 Edw. IV. 28.

borough, incorporates it.[1] So, also, a grant by the king to the men of Dale that they be discharged of tolls, incorporates them for this particular purpose, but does not enable them to purchase.[2] The settled doctrine is that a corporation may be created by implication, as well as by the use of express words. But this implication, to be sufficient, must clearly evince or express the intention to establish or constitute a body politic or corporate—that is, to invest it with corporate powers and privileges. But the absence of *express* provision respecting the *incidents* which the law tacitly annexes to corporations, is considered immaterial. Thus the omission in the charter or act of the words "to plead and be impleaded," or "to have a seal," or "to make by-laws," would not make it essentially defective.[3] So it would not be essentially defective if the *name* was omitted, if the name could be ascertained from the terms of the charter or act, or from the nature of the thing or matters granted.[4] Certain attributes or powers are absolutely essential to constitute a body corporate, such as perpetual succession, the right to contract, to sue and be sued as a corporation, &c. Now if the charter or act, which is relied upon as

[1] 1 Kyd, 62, cites Firm. Burg. Chap. II.; Madox Hist. Exch. 402.

[2] Vin. Abr. Corp. F. pl. 6; *ib.* pl. 4; Bagot's Case, 7 Edw. IV. 29; Grant on Corp. 43, note *e*, and cases cited.

[3] 1 Rol. Abr. 513; 1 Kyd, 63; The Conservators, &c. *v.* Ash, 10 Barn. & Cress. 349; 21 Eng. C. L. 97, 1829. "It is not necessary," says Mr. Kyd, "that the charter should *expressly* confer those powers without which a collective body of men cannot be a corporation, such as the power of suing and being sued, and to take and grant property, though such powers are, in general, expressly given." 1 Kyd Corp. 63. Thus, in the case of the *Borough of Yarmouth*, 1609, 2 Brownlow & Goldsb. 292, part II. it was decided by the common bench, *per* Lord Coke, that a grant of incorporation to the burgesses or citizens of a borough or city, which, being an old grant, should be favorably construed, was good, without the words "their successors." And see, on this subject, the learned opinion of *Shaw*, C. J., in Overseers of Poor, &c. *v.* Sears, 22 Pick. 122, 130, 1839. He says: "The *mode* of perpetuating the existence of a corporate body is not essential; all that is essential is that some mode be provided by the charter or act by which it is constituted, or by the general laws of the government, by means of which it shall be so perpetuated." 22 Pick. 130; The Conservators *v.* Ash, 10 Barn. & Cress. 349; 21 Eng. C. L. 97.

[4] Trustees *v.* Parks, 10 Maine (1 Fairf.), 441; School Com. *v.* Dean, 2 Stew. & Port. (Ala.) 190, 1832.

creating a body corporate by implication, instead of simply *omitting* to express these essential properties, negatives and excludes them, it is plain that the body would not be deemed incorporated.[1]

§ 22. Although corporations in this country are created by statute, still the rule is here also settled that not only private corporations aggregate, but municipal or public corporations, may be established without any particular form of words, or technical mode of expression, though such words are commonly employed.[2] If powers and privileges are conferred upon a body of men, or upon the residents or inhabitants of a town or district, and if these cannot be exercised and enjoyed, and if the purposes intended cannot be carried into effect, without acting in a corporate capacity, a corporation is, to this extent, created by implication. The question turns upon the intent of the legislature, and this can be shown constructively as well as expressly.[3] This is well illustrated in a case in Massachusetts,[4] where the question was whether the plaintiffs were a corporate body, with power to sue. They were not incorporated expressly. But, by statute, the inhabitants of the several school districts were empowered, at any meeting properly called, to raise money to erect, repair, or purchase a school house, to determine its site, &c., &c., the majority binding the

[1] Grant on Corp. 30.

[2] Thomas *v.* Dakin, 22 Wend. 9, 84, *per Cowen*, J., and authorities cited; Bow *v.* Allentown, 34 N. H. 351, 372; Stebbins *v.* Jennings, 10 Pick. 172; Denton *v.* Jackson, 2 John. Ch. 325, 326, 1817; Mahoney *v.* The Bank of the State, 4 Ark. 620, 1842; S. C. well digested in Angell & Ames on Corp. Sec. 77; North Hempstead *v.* Hempstead, 2 Wend. 109, 133, opinion by *Savage*, C. J.; Conservators of River Tone *v.* Ash, 10 Barn. & Cress. 349; Jeffreys *v.* Garr, 2 B. & Adol. 841; *ex parte* Newport Trustees, 16 Sim. 346; 2 Kent Com. 27.

[3] Same cases last cited.

[4] Inhabitants, &c. *v.* Wood, 13 Mass. 193, 1816 — Mr. Fessenden, for the plaintiff, and Mr. Greenleaf, for the defendant. In Bow *v.* Allentown, 34 N. H. 351, it was held that the annexation, by the legislature, of other territory to *the town* of Allentown made that a corporate town by *implication*, if it was not so before; and such, also, was the effect, under the constitution of New Hampshire, of a grant to a place having less than one hundred and fifty polls to send a representative. A legislative grant gives capacity to hold the thing granted. Lord *v.* Bigelow, 8 Verm. 465.

minority. The cause was argued by able counsel, and, after several consultations, the supreme court all finally agreed in the opinion that the plaintiffs possessed sufficient corporate powers to maintain an action on a contract to build a school house, and to make to them a lease of land. But the *intention* of the legislature, where it is sought to show that a corporation has been created by implication, must plainly appear.[1]

Acceptance of Charter.

§ 23. The rule which applies to private corporations, that the incorporating act is ineffectual to constitute a corporate body until it is *assented to or accepted* by the corporators, has no application to statutes creating municipal corporations. These are imperative and binding without any consent, unless the act is expressly made conditional. All who live within the limits of the incorporated district are bound by them, and can only withdraw from the corporation by removal. Over such corporations the legislature, unless restrained by the constitution, has entire control; and unless otherwise provided by the act itself, or a different intention be manifested, the public corporation is legally constituted as soon as the incorporating act declaring it to exist goes into effect.[2] But while the legislature

[1] Medical Institute *v.* Patterson, 1 Denio, 61; S. C. affirmed in court of errors, 5 *ib.* 618, 1846; Myers *v.* Irwin, 2 Serg. & Rawle, 368, 1816; Angell & Ames, Sec. 79, and cases cited; Wells *v.* Burbank, 17 N. H. 393; Society, &c. *v.* Town of Pawlet, 4 Pet. (U. S.) 480, 502. To establish a corporation by implication, says *Shaw*, C. J., in Stebbins *v.* Jennings, 10 Pick. 172, it must appear that the rights and powers conferred can only be enjoyed by the exercise of corporate powers, and, therefore, if such powers are not necessary, they are not impliedly given.

[2] Berlin *v.* Gorham, 34 N. H. 266, 1856, *per Bell*, J., where it is accordingly held, that to make an incorporation of a town effectual, it is not necessary that there should be a legal town meeting holden in it. See also People *v.* Wren, 4 Scam. 269; Warren *v.* Charlestown, 2 Gray, 104; Mills *v.* Williams, 11 Ire. 558; State *v.* Curran, 7 Eng. 321; Fire Department *v.* Kip, 10 Wend. 267; People *v.* Morris, 13 Wend. 325, 337; Brouwer *v.* Appleby, 1 Sandf. 158, 1847; People *v.* President, 9 Wend. 351; Wood *v.* Bank, 9 Cow. 194, 205, 1828; Proprietors, &c. *v.* Horton, 6 Hill, 501; Gorham *v.* Springfield, 21 Maine, 58, 1842; People *v.* Stout, 23 Barb. 349, 1856; Bristol *v.* New Chester, 3 N. H. 524, 532, 1826; State *v.* Canterbury, 8 Fost. 218.

is not bound to obtain the acceptance or assent of the municipal corporation, it is well established that a provision in a municipal charter that it shall not take effect unless assented to or accepted by a majority of the inhabitants, is not unconstitutional, it being in no just sense a delegation of legislative power, but merely a question as to the acceptance or rejection of a charter.[1] So a provision in a charter, or the constituent act of a municipal corporation, by which the right to make certain improvements or to create certain liabilities is made to depend upon a vote of the people interested, has frequently been upheld as valid.[2] So an act directing an election to be held by the qualified electors interested to determine, by ballot, whether a newly-erected township should be continued, is constitu-

Acceptance, when requisite, may, doubtless, be implied, in proper cases, as where no particular mode of expressing acceptance is prescribed, from corporate acts and conduct, as in cases of private corporations. Taylor *v.* Newberne, 2 Jones Eq. (N. C.) 141, 1855. See Zabriskie *v.* Railroad Co. 23 How. (U. S.) 381, 397, 1859.

[1] People *v.* Salomon, 51 Ill. 53, 1869; Alcorn *v.* Horner, 38 Miss. 652, 1860; Patterson *v.* Society, &c. 4 Zabr. (N. J.) 385, 1854; Smith *v.* McCarthy, 56 Pa. St. 359; County *v.* Quarter Sessions, 8 Barr. 395; Commonwealth *v.* Painter, 10 *ib.* 214; and see also Bull *v.* Read, 13 Gratt. (Va.) 78, 1853; People *v.* Reynolds, 5 Gilm. (Ill.) 1; State *v.* Scott, 17 Mo. 521; Hudson Co. *v.* State, 4 Zabr. 718; Bank *v.* Brown, 26 N. Y. 467, 1863. This case asserts a distinction between a bill submitted to the people of the whole state for adoption or rejection, and an act which leaves it to the inhabitants of a particular locality whether they will avail themselves of its provisions. It has been held in New Hampshire that it was competent for the legislature, under the constitution of the state, to enact a penal law which shall have effect only in those towns which adopt it by vote. State *v.* Noyes, 10 Fost. 279, 1855. An amendment to a city charter was to take effect only when adopted "by a majority of the voters of the city." This was considered to manifest the intention to present the question of acceptance to the voters at a regular *city* election. The council ordered the vote to be taken at the *township* polls; the voters of the two organizations possessing different qualifications, but the township and city occupied precisely the same territory: Held, that the election was of no validity, and that the amendment had never been duly accepted. Foote *v.* Cincinnati, 11 Ohio, 408, 1842.

[2] Clarke *v.* Rochester, 28 N. Y. 605; Bank of Rome *v.* Rome, 18 N. Y. 38; Trustees *v.* Cherry, 8 Ohio St. 564; Burnes *v.* Achison, 2 Kansas, 454, 1864; Bank *v.* Brown, 26 N. Y. 467; Hammond *v.* Haines, 25 Md. 541; Railroad Co. *v.* Commissioners, 1 Ohio St. 77; Foote *v.* Cincinnati, 11 Ohio, 408, 1842; St. Louis *v.* Alexander, 23 Mo. 483; Blanding *v.* Burr, 13 Cal. 343. These cases are distinguishable from Barto *v.* Himrod, 4 Seld. 483.

tional.[1] On the same principle the legislature may provide that a statute shall cease to exist unless the municipal corporation to be affected by it shall, within a prescribed period, assent to it.[2]

Special Constitutional Provisions.

§ 24. The constitutions of many of the states contain provisions respecting the creation and powers of municipal corporations. In some of the constitutions the legislature is in terms allowed to create corporations for municipal purposes by *special act*,[3] and, in others, it is, in terms, forbidden to do this, and required to provide a *general law* for all corporations, public and private.[4] So far as municipal corporations and their

[1] Commonwealth *v.* Judges, &c. 8 Pa. St. 391; distinguished from Parker *v.* Commonwealth, 6 *ib.* 507; Commonwealth *v.* Painter, 10 Pa. St. 214, 1849; Smith *v.* McCarthy, 56 Pa. St. 359. Where the authority to act depends upon the prior sanction of "a *majority of the qualified voters*" residing in the the corporation, the presumption is, that all who vote are legal voters; and the better view probably is, that those who do not vote, acquiesce in the result, and that a majority of those actually voting is sufficient, though in point of fact, it may not be a majority of all who would be entitled to vote. State *v.* Binder, 38 Mo. 450, 1866; State *v.* Mayor, &c. 37 Mo. 270. But compare State *v.* Winkelmeier, 35 Mo. 103, which construes such language to require a "majority of all the legal voters of the city, and not merely of all who might, at a particular time, choose to vote upon it." See Damon *v.* Granby, 2 Pick. 345, 355, 1824, and chapter on Corporate Meetings, *post.*

[2] Corning *v.* Greene, 23 Barb. 33, 1856.

[3] 1 *Post*, Chap. IV. *New York* constitution, 1846, Art. VIII. Sec. 1; *Illinois* constitution, 1847, Art. X. Sec. 1; see, also, new constitution, 1870; *Michigan* constitution, 1850, Art. XV. Sec. 1; *California* constitution, 1849, Art. IV. Sec. 31; construed Railroad Co. *v.* Plumas Co. 37 Cal. 354; *Minnesota* constitution, 1857, Art. X. Sec. 2; Tierney *v.* Dodge, 10 Minn. 171; 12 *ib.* 41; *Oregon* constitution, 1857, Art. XI. Sec. 2; *Louisiana* constitution, 1864, Title VII. Art. CXXI.; *Nevada* constitution, 1864, Art. VIII. Sec. 1; construed, Virginia City *v.* Mining Co. 2 Nev. 86. In *Missouri* it is provided that no municipal corporation shall be created by special act, except cities of at least 5,000 inhabitants, the special act to be approved by a vote of the inhabitants. Constitution 1867, Art. VIII. Sec. 5.

[4] *Iowa* constitution, 1857, Art. III. Sec. 30, Von Phul *v.* Hammer, 29 Iowa, 222; *Florida* constitution, 1865, Art. IV. Sec. 20; *Nebraska* constitution, Art. VIII. Secs. 1 and 2. By the new constitution of *Illinois*, *special* legislation is forbidden "incorporating cities, towns, or villages, or changing or amending the charter of any town, city, or village." *Kansas* constitution, Art. XII.

rights are protected by constitutional provisions, express or implied, they are removed from legislative control, but no further, as we shall see in a subsequent chapter. Although the constitution of a state may recognize the municipal corporation of an important city by fixing the number of certain officers, and providing for their election, &c., yet this does not make the charter of the city a constitutional charter conferring powers beyond the control of the legislature.[1]

Secs. 1 and 5; construed, Wyandotte City *v.* Wood, 5 Kansas, 603; Achison *v.* Barlow, 4 *ib.* 124. The constitution of *Ohio* is as follows: "The general assembly shall provide for the organization of cities and incorporated villages by *general laws*, and restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power." Constitution A. D. 1851, Art. XIII. Sec. 6. Under this section the legislature, by the Towns' and Cities' Act of May 3, 1852 (Swan & Critchf. Stats. 1497), undertook to provide for the government of all such places by a general statute. Thomas *v.* Ashland, 12 Ohio St. 124. An act applying to *all cities* of the first class containing less than one hundred thousand inhabitants, is not in conflict with the provision of the constitution which requires all laws of a general nature to have a uniform operation throughout the state. Welker *v.* Potter, 18 Ohio St. 85, 1868; see also Lafayette *v.* Jenners, 10 Ind. 70, 80, 1857.

[1] Baltimore *v.* Board of Police, 15 Md. 376, 1859; see also Paterson *v.* Society, &c. 4 Zabr. (N. J.) 385, 1854. In People *v.* Draper, 15 N. Y. 561, *Brown*, J., says: "When the present constitution was formed, the entire territory of the state was separated, and appropriated by its civil divisions, its counties, cities, and towns. These civil divisions are coeval with the government. The state has never existed a moment without them. All our thoughts and notions of civil government are inseparably associated with counties, cities, and towns. They are permanent elements in the frame of government; they are institutions of the state, durable and indestructible by any power less than that which gave being to the organic law. They are, however, subject to control and regulation by the legislature. It may enlarge or circumscribe their territorial limits, increase or diminish their numbers, separate them into parts, and annex some of the parts to parts of others; but they must still assume the form and be known and governed only as counties, cities, or towns. The state at large is, and ever has been, an aggregate of these local bodies." To same effect, in same case, *ib.* 541, *per Denio*, C. J. See also People *v.* Morrell, 21 Wend. 563 (division of counties); *ante*, pp. 17–22. In People *v.* Hurlburt, decided by the Supreme Court of Michigan, in 1871, and not yet reported, this subject is largely and learnedly examined by Mr. Justice *Cooley*, who, conceding to the state full authority to shape and control municipal organizations at its will, nevertheless maintained that there were, in the constitution of that state, both express and implied restrictions upon the legislative dominion over municipal institutions, and that local governments and the right of the people to

§ 25. A constitutional provision that two-thirds of the general assembly "shall be requisite to *every* bill creating, continuing, altering, or renewing *any body politic or corporate*," was held by a majority of the court of errors, reversing the majority view of the supreme court in the same case, to extend to *public* and *municipal*, as well as private, corporations.[1]

§ 26. Under a constitution which provides that "in all cases where *a general law* can be made applicable, no special law shall be enacted," the better view is, that it is for the *legislature* to determine whether their purpose can or cannot be expediently effected by a general law, and a special act, as, for example, one providing for the location of the county seat of a specified county, will not be held invalid by the courts.[2]

§ 27. The constitutions of several of the states contain, substantially, this provision, derived from the constitution of New York: "It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to *restrict their power of taxation, assessment, borrowing money, contracting debts*, and *loaning their credit*, so as to prevent abuses in assessments, and in contracting debts by such mu-

them were secured by the constitution, and did not exist by the favor and at the mere pleasure of the legislature. And in the same case the court decided, under a special provision of the constitution of the state, elsewhere noticed, that the legislature could not appoint, for a city corporation, officers whose duties were purely local and strictly municipal. The discussions by all of the judges are unusually interesting. *Ante*, p. 20, *et seq.*

[1] Purdy *v.* People, 4 Hill (N. Y.) 384, 1842; reversing, 2 Hill, 31. What is an *alteration* within this provision: Corning *v.* Green, 23 Barb. 33; Smith *v.* Helmer, 7 Barb. 416; Morris *v.* People, 3 Denio, 381. Where a constitution requires that acts of incorporation shall have "the assent of at least two-thirds of each house," the word *house* means the members present doing business — these being a quorum — and not a majority of all the members elected. Southworth *v.* Railroad Co. 2 Mich. 287.

[2] State *v.* Johnson, 1 Kansas, 178, 1862; *contra, ex parte* Pritz, 9 Iowa, 30, 1859, where a special act amending the charter of a city was held invalid because all such laws were, by the constitution of the state, required to be, and could be, made general. Von Phul *v.* Hammer, 29 Iowa, 222. It is for the legislature, and not the courts, to determine when a general law can be made applicable. Gentile *v.* State, 29 Ind. 409, overruling Thomas *v.* Board of Commissioners, 5 Ind. 4; Longworth's Executors *v.* Evansville, 32 Ind. 322; Cooley, Const. Lim. 129, note.

nicipal corporations."[1] This obviously enjoins upon the legislature the duty of providing suitable and proper restrictions upon the enumerated powers, but in what these restrictions shall consist, and how they shall be imposed, are subjects left to the discretion or sense of duty of the legislative department, with the exercise of which the courts cannot interfere.[2] The Supreme Court of Wisconsin, in the case cited in the note, holds, to some extent, a contrary view, but its judgment was, in effect, although not in terms, overruled by the Supreme Court of the United States, and in its full extent is not in accord with the view elsewhere taken in the state courts.[3]

[1] New York constitution 1846, Art. VIII. Sec. 9; Wisconsin constitution 1848, Art. XI. Sec. 3; Michigan constitution 1859, Art. XII. Sec. 13; Oregon constitution 1857, Art. XI. Sec. 5; Kansas constitution 1859, Art. XII. Sec. 5; see Paine *v.* Spratley, 5 Kansas, 525; Nevada constitution 1864, Art. VIII. Sec. 8; Nebraska constitution, Art. VIII. Sec. 4; California constitution 1849, Sec. 37; Ohio constitution 1851, Art. XIII. Sec. 6. See, also, chapters relating to Contracts and Taxation, *post.*

[2] The failure of the legislature to perform the duty relative to restricting the power of taxation, &c., enjoined by the constitutional provision above cited, "may," says *Ranney*, J., in Hill *v.* Higdon, 5 Ohio St. 248, "be of very serious import, but lays no foundation for *judicial* correction." See Maloy *v.* Marietta, 11 Ohio St. 636, 638, where this view is left open, but holding that the legislature alone has the power to determine the *mode* and *measure* of the restriction to be imposed. It was also left open in the People *v.* Mahaney, 13 Mich. 481, but this case illustrates what is a sufficient *restriction* on the power of taxation to meet the constitutional requirement. See also Cooley, Const. Lim. 518; Railroad Co. *v.* Connelly, 10 Ohio St. 165. To the effect that the constitutional provision quoted in the text does not take away, but recognizes, the *discretion* of the legislature in conferring powers of the enumerated character upon municipal corporations, and that such discretion is not reviewable by the courts, see Bank of Rome *v.* Rome, 18 N. Y. 38, 1858; Benson *v.* Mayor, &c., of Albany, 24 Barb. 248, 1857; Clarke *v.* Rochester, *ib.* 446; Grant *v.* Courter, *ib.* 232.

[3] Foster *v.* Kenosha, 12 Wis. 616, 1860. The legislature cannot, consistently with this restriction, confer upon a municipal corporation an unlimited power to levy taxes and raise money for extra-municipal purposes, such as aiding railroad companies, and an amendment to the charter of a city authorizing its council "to levy and collect special taxes for *any* purpose (aside from what may be specially provided for in the city charter), which may be considered essential to promote or secure the common interests of the city, or borrow, on the corporate credit of the city, *any* sum of money at a rate of interest not exceeding ten per cent," on obtaining

§ 28. Many of the state constitutions contain, in substance, a provision that *no legislative act shall embrace more than one object*, to be expressed in *its title*. This provision has been frequently construed to require only the general or ultimate object to be stated in the title, and not the details by which the object is to be attained. Any provision calculated to carry the declared object into effect is unobjectionable, although not specially indicated in the title. Thus, where a constitution provides that no bill or act shall pass containing any matter different from what is expressed in the title thereof, an act, the title of which declares it to be *for the better regulation of a certain town* (naming it), *or to amend or enlarge the powers of the corporation thereof*, is sufficient, without enumerating the particulars in which the powers are enlarged or extended.[1] So a provision in an act entitled merely, "An act to amend the act incorporating the city of M," extending the city limits, does not conflict with the constitutional requirement that "every law shall embrace but one object, which shall be expressed in its title."[2]

the previous sanction of a majority of the voters of the city, is void, and the requirement of the sanction of the voters is not a restriction on the power to levy taxes or contract debts, within the meaning of the constitution, the court being of opinion that the duty of imposing the limitation rests on the legislature. *Ib.* But see Campbell *v.* Kenosha, 5 Wall. 194, 1866; City *v.* Lamson, 9 Wall. 477, 1869; and the authorities cited in the last note.

Other restrictions upon the power to contract debts: see chapters on Charters and Contracts, *post.*

[1] Green *v.* Mayor, R. M. Charlt. (Geo.) 368, 1832, *per Law*, J.; Mayor *v.* State, 4 Geo. 26; Hill *v.* Decatur, 22 Geo. 203.

[2] Morford *v.* Unger, 8 Iowa, 82, 1859; Davis *v.* Woolnough (act establishing city court), 9 *ib.* 104; S. P. St. Paul *v.* Coulter, 12 Minn. 41, 50, 1866. In determining whether a law be in conflict with this provision of the constitution, the unity of the object is to be looked for in the ultimate end to be attained, and not in the details leading to that end. State, &c. *v.* Co. Judge, 2 Iowa, 280; People *v.* Mahaney, 13 Mich. 481, 1865; People *v.* Hurlburt, Mich. Supreme Court, 1871. Construction of similar constitutional provision: Arnoult *v.* New Orleans, 11 La. An. 54; Kathman *v.* New Orleans, *ib.* 145; People *v.* Mellen, 32 Ill. 181; Railroad Co. *v.* Gregory, 15 Ill. 21; Davis *v.* State (inspection act for Baltimore), 7 Md. 151; Annapolis *v.* State, 30 Md. 112; Lafou *v.* Dufrocq, 9 La. An. 350; Ottawa *v.* People, 48 Ill. 233, 1868. And see, generally, on this subject, Cooley Const. Lim. 81, 141.

CHAPTER IV.

Public and Private Corporations Distinguished — Legislative Authority and its Limitations.

§ 29. A *fundamental division* of corporations heretofore adverted to, is into *public* and *private*.[1] The importance of this distinction cannot be too much emphasized, since upon it are based the legal principles which so broadly distinguish the two classes of corporations. With private corporations the present

[1] *Ante*, Chapter II. In Mills *v.* Williams, 11 Ire. (Nor. Car.), Law, 558, 1854, *Pearson*, J., commenting on the common divisions of corporations, says: "The purpose in making all corporations is the accomplishment of some *public good*. Hence, the division into public and private has a tendency to confuse and lead to error in investigation; for, unless the public are to be benefited, it is no more lawful to confer 'exclusive rights and privileges' upon an artificial body, than upon a private citizen. The substantial distinction is this: Some corporations are created by the *mere will* of the legislature, there being no other *party interested or concerned*. To this body a portion of the power of the legislature is delegated, to be exercised for the public good, and subject at all times to be modified, changed, or annulled. Other corporations are the result of *contract*. The legislature is not the only party interested; for, although it has a public purpose to be accomplished, it chooses to do it by the instrumentality of a *second party*. These two make a contract. The expectation of benefit to the public is the moving consideration on one side; that of expected remuneration for the outlay is the consideration on the other. *It is a contract*, and, therefore, cannot be modified, changed, or annulled without the consent of both parties. Counties are an instance of the former, railroad and turnpike companies of the latter, class of corporations." This recognizes the substantial difference between the two classes of corporations, and is, in effect, a criticism upon the names by which they are distinguished.

According to the view of the supreme court of California, corporations should be divided into three classes, to-wit: Public municipal corporations, the object of which is to promote the public interest; corporations technically private, but of a *quasi* public character, having in view some public enterprise in which the public interests are involved, such as railroad, turnpike, and canal companies; and corporations strictly private. Miner's Ditch Company *v.* Zellerbach, 37 Cal. 543, 1869. The opinion of *Sawyer*, C. J., in this case, is able and instructive. The author prefers the ordinary division of corporations into public (which includes municipal) and private.

work has no other concern than to point out wherein they differ from those which are public. Both classes are alike created by the legislature, and in the same way — by special charter or under general incorporation acts. *Private corporations* are created for private, as distinguished from governmental, purposes, and they are not, in contemplation of law, public because it may have been supposed by the legislature that their establishment would promote, either directly or consequentially, the public interest. They cannot be compelled to accept a charter or incorporating act. The assent of the corporation is necessary to make the incorporating statute operative. But when assented to, the legislative grant is irrevocable, and it cannot, without the consent of the corporation, be impaired or destroyed by any subsequent act of legislation, unless the right to do so was reserved at the time. The celebrated *Dartmouth College Case*, by its construction of the federal constitution, incorporated, wisely or otherwise, into American jurisprudence the principle which has been attended with such important practical consequences, namely, that privileges and franchises granted by legislative act to a private corporation, when accepted, constitute a *contract* within the meaning of the clause of the constitution, which secures the inviolability of contracts by declaring that no state shall pass any law impairing their obligation; and hence a law materially altering the charter of such a corporation is unconstitutional, unless the power to alter it was reserved when the grant was made.

§ 30. *Public corporations* are called into being at the pleasure of the state, and while the state may, it need not, obtain the consent of the people of the locality to be affected. The charter or incorporating act of a municipal corporation is in no sense a contract between the state and the corporation, although, as we shall see, private or vested rights in favor of third persons, if not in favor of the corporation, may arise under it. Public corporations within the meaning of this rule are such as are established for public purposes exclusively — that is, for purposes connected with the administration of civil or local government — and corporations are public only when, in the language of Chief Justice *Marshall*, "*the whole interests* and franchises are the exclusive property and domain of the

government itself," such as *quasi* corporations (so-called), counties and towns or cities upon which are conferred the powers of local administration. With the exception of certain constitutional limitations presently to be noticed, the power of the legislature over such corporations is supreme and transcendent: it may erect, change, divide, and even abolish, at pleasure, as it deems the public good to require.[1] And it may be here ob-

[1] Dartmouth College *v.* Woodward, 4 Wheat. 518, 1819; Allen *v.* McKean, 1 Sumner, 276, 1833 (the Bowdoin College Case elaborately considered by *Story*, J.); People *v.* Morris, 13 Wend. 325, 1835. In this case the defendant insisted that the rights and privileges conferred upon the village of Ogdensburg by the act incorporating it were *vested rights*, and could not be impaired by subsequent legislation. But, said *Nelson*, J., with his usual clearness: "It is an unsound and even absurd proposition that political power conferred by the legislature can become a vested right as *against the government* in any individual or body of men." S. P. Penobscot Boom Corporation *v.* Lawson, 16 Maine, 224; Yarmouth *v.* North Yarmouth, 34 Maine, 411, 1852; Story Com. Const. Secs. 1385, 1388; North Yarmouth *v.* Skillings, 45 Maine, 133, 1858; Girard *v.* Philadelphia, 7 Wall. 1, 1868; *ante*, p. 28. "A municipal corporation, in which is vested some portion of the administration of the government, may be changed at the will of the legislature. Such is a public corporation, used for public purposes." *Per McLean*, J., in State Bank *v.* Knoop, 16 How. U. S. 369, 380, 1853. "Public or municipal corporations are established for the local government of towns or particular districts. The special powers conferred upon them are not vested rights as against the state, but, being wholly political, exist only during the will of the general legislature; otherwise, there would be numberless petty governments existing within the state and forming part of it, but independent of the control of the sovereign power. Such powers may at any time be repealed or abrogated by the legislature, either by a general law operating upon the whole state, or by a special act altering the powers of the corporation." Sloan *v.* State (implied modification of charter as to vending liquor by subsequent general law), 8 Blackf. (Ind.) 361, 1847, *per Smith*, J.; approving, People *v.* Morris, 13 Wend. 325; Armstrong *v.* Commissioners (as to removal of county seat), 4 Blackf. (Ind.) 208, 1836.

As to extent of *legislative control*, and the distinction between *public and private* corporations, see, also, People *v.* Wren (division of a county), 4 Scam. (Ill.) 273; Coles *v.* Madison County, Breese (Ill.) 120; Bush *v.* Shipman, 4 Scam. (Ill.) 190; Holliday *v.* People, 5 Gilm. (Ill.) 216; Richland County *v.* Laurence County, 12 Ill. 8; Trustees, &c. *v.* Tatman, 13 Ill. 30; Gutzweller *v.* People, 14 Ill. 142; State *v.* Mayor, R. M. Charlt. (Geo.) 250; State, &c. *v.* St. Louis County Court, 34 Mo. 546; Purdy *v.* People, 4 Hill (N. Y.) 385; Morey *v.* Newfane, 8 Barb. 645; Lloyd *v.* Mayor, &c. of New York, 5 N. Y. (1 Seld.) 369; Lowler *v.* Same, 7 Abb. Pr. R. 248; Green *v.* Same, 5 *ib.* 503; Aurora *v.* West, 9 Ind. 74; Plymouth *v.* Jackson, 15 Pa. St. 44; Louisville *v.* Commonwealth, 1 Duvall (Ky.) 295; Tinsman *v.* Railroad Company, 2

served that the extent of legislative control over public or municipal corporations is not impaired by the circumstance that the charter is granted in the same act that creates a private corporation, whose rights cannot be changed without their consent.[1] Where, in incorporating a gas company, the legislature reserved the power to alter, modify, or repeal the charter, it is competent for it, by subsequent legislation, to subject the company to supervision and control, and to confer the power upon the municipal corporation in which the works of the company are erected to regulate the price of gas, and ordinances duly passed in pursuance of such power are binding upon the company.[2]

§ 31. Some of the leading *differences between public and private corporations* are clearly stated in a case decided in New Jersey. In an action by a riparian proprietor against a *canal company*, for obstructing a water course, the company insisted that it was not liable, because the work was authorized by its charter; that the acts it did were legal; that the injury complained of was consequential; that the enterprise was a public work, designed for public purposes, and that the company, in executing it, acted as the public agents of the state. But the court held that the company was not a public corporation. On this point *Nevius*, J., the organ of the court, observed: "Public corporations are political corporations, or such as are founded wholly for public purposes, and the *whole* interest in which is in the public. The fact of the public having an interest in the works or the property or the object of a corporation, does not make it a public corporation. All corporations, whether public or

Dutch. (N. J.) 148; Marietta *v.* Fearing, 4 Ohio, 427; State *v.* Mayor, &c. 24 Ala. 701; Governor *v.* McEwen, 5 Humph. (Tenn.) 241; Grogan *v.* San Francisco, 18 Cal. 590; Darlington *v.* Mayor, &c. of New York, 31 N. Y. 164; Savings Fund Society *v.* Philadelphia, 31 Pa. St. 175, 185; Philadelphia *v.* Field, 58 Pa. St. 320; Erie *v.* Canal Company, 59 Pa. St. 174; Dunsmore's Appeal, 52 Pa. St. 374; Blanding *v.* Burr, 13 Cal. 343, 1859; People *v.* Hill, 7 Cal. 97, 1857.

[1] Patterson *v.* Society, &c. 4 Zabr. (N. J.) 385, 1854. See, also, Baltimore *v.* Board of Police, 15 Md. 376, 1859.

[2] State *v.* Cincinnati Gas Company, 18 Ohio St. 262, 1868. See, also, Norwich Gaslight Company *v.* Norwich City Gas Company, 25 Conn. 19, 1856.

private, are, in contemplation of law, founded upon the principle that they will promote the interest or convenience of the public. A bank is a private corporation, yet it is, in the eye of the law, designed for public benefit. A turnpike or a canal company is a private company, yet the public have an interest in the use of their works, subject to such tolls and restrictions as the charter has imposed. The interest, therefore, which the public may have in the property or in the objects of a corporation, whether direct or incidental (unless it has the whole interest), does not determine its character as a public or private corporation. In the present case, whatever may have been the objects of the corporation, whether to erect a public navigable highway, or to improve the navigation of the Raritan river, or whether the public have a right to the use and enjoyment of these improvements, when made, or not, the company are essentially a private company, and are not the agents of the state. Their works are not constructed by the requirement of the state, nor at the expense of the state, nor does the stock belong to the state, nor is the state answerable for the lands or materials used in the construction of these works, or responsible for the debts of the company, or for injuries committed by them in the execution of their work. The state could not compel the company to construct this canal or improve the navigation of the river; it has permitted them to do so at their own request. The company might have abandoned the work whenever they saw fit; they may now abandon it without responsibility to the state. The corporation itself, the property of the corporation, the object of the corporation are essentially private, subject only to public use, under their own restrictions, and from which use the company are to derive the profits."[1]

[1] *Nevius*, J., Ten Eyck *v.* Canal Company, 3 Harrison (N. J.) 200, 203, 1841; approved, Hanson *v.* Vernon, 27 Iowa, 28, 53, 1869.

In an elaborate and well-considered opinion, in which the court of appeals of Maryland held the regents of the university of that state to be a *private* corporation, though its ends were public, *Buchanan*, C. J., delivering the judgment of the court, thus *defines a public corporation*: "A *public* corporation is one that is created for political purposes, with political powers, to be exercised for purposes connected with the public good in the administration of civil government; an instrument of the government subject to the control of the legislature and its members, officers of the government,

§ 32. The adjudged cases present some contrariety of opinion respecting the *scope of legislative authority* over municipal corporations, or rather, respecting the question how far such corporations, viewed as legal personalities, are within the operation or protection of the usual constitutional restraints upon legislative power. The present chapter will be devoted to a consideration of this subject, and it can, perhaps, be most satisfactorily presented by viewing it in the light of actual adjudications, accompanied with such observations and comment as seem to be suitable and necessary. The extent of the authority of the legislature over public corporations is strikingly

for the administration or discharge of public duties, as in the cases of cities, towns, &c.; so where a bank is created by the government for its own uses, and the stock belongs exclusively to the government, it is a public corporation; and so of a hospital created and endowed by the government for general purposes of charity." Regents of University *v.* Williams, 9 Gill & Johns. (Md.) 365, 397, 1838. See, also, Norris *v.* Trustees, 7 Gill & Johns. 7.

Speaking of *public corporations*, and the relations they sustain to the state, the supreme court of Louisiana uses this language: "The government of cities and towns, like that of the police jury of parishes (counties), forms one of the sub-divisions of the internal administration of the state, and is absolutely under the control of the legislature. The laws which establish and regulate municipal corporations are not contracts, but ordinary acts of legislation, and the powers they confer are nothing more than mandates of the sovereign power, and those laws may be repealed or altered at the will of the legislature, except so far as the repeal or change may affect the rights of third persons acquired under them." Police Jury *v.* Shreveport (repeal of corporate ferry right), 5 La. An. 661, 1850; State Bank *v.* Navigation Company (construction of charter), 3 *ib.* 294, 1848; Reynolds *v.* Baldwin, 1 *ib.* 162; Haynes *v.* Municipality, 5 *ib.* 760; Edgerton *v.* Municipality, 1 *ib.* 435; Board *v.* Municipality, 6 *ib.* 21, 1851.

In the opinion of the supreme court of the United States, holding that the legislature of a state might lawfully repeal or discontinue a ferry franchise granted to a municipal corporation, it is remarked that towns and cities, "which are public municipal and political bodies, are incorporated for public, and not private, objects. They are allowed to hold privileges or property only for public purposes. The members are not shareholders, nor joint partners in any corporate estate, which they can sell or devise to others, or which can be attached or levied on for their debts. Hence, generally, the doings between them and the legislature are in the nature of legislation rather than compact, and subject to all the legislative conditions named, and, therefore, to be considered as not violated by subsequent legislative changes." *Per Woodbury*, J., in East Hartford *v.* Hartford Bridge Company, 10 How. (U. S.) 511, 534, 1850. See, also, Trustees *v.* Tatman, 13 Ill. 30.

illustrated by an important case decided by the court of appeals of the state of Maryland. The legislature in incorporating a railroad company made it its duty to locate its road through three towns specially named, and provided, that if it failed to do so, "then and in that case said company shall forfeit $1,000,000 to the state of Maryland *for the use of Washington county.*" The action was instituted for the benefit of the county to recover the one million dollars, it being alleged that the defendant had not constructed its road in the manner required. The defendant pleaded that since the last continuance the legislature had passed an act repealing that portion of the charter of the company requiring it to build its road through said towns, and *specially remitting and releasing the forfeiture of* $1,000,000. The leading question, which was argued on either side by distinguished counsel, was, whether the provision in favor of the county was one of *contract* (the railroad company having assented to the act), and hence claimed to be inviolable by legislative interference, or whether it was one of *penalty*, and therefore subject to unlimited legislative control. The court held the latter view to be the true one, and that the defendant was not liable. The court also expressed the opinion that if it should be treated as a contract made by the state, yet it was a contract for the benefit of one of its counties, to which the money, if collected, would belong, in its political and public capacity, as part of the state, and that such a contract did not come within the meaning of that provision of the national constitution which prohibits a state from impairing the obligation of a contract, so as to prevent the legislature from releasing it at pleasure, or discontinuing an action brought for its enforcement in the name of the state.[1]

§ 33. Questions have arisen under special constitutional provisions respecting the authority of the legislature over *mu-*

[1] State *v.* Railroad Co. 12 Gill & Johns. (Md.) 399, 1842; affirmed on error, 3 How. (U. S.) 534, 1845. A public corporation has no vested right to *fines* directed to be paid to it, and the legislature may release them. No contract in such cases is thereby violated, for none exists. Coles *v.* Madison County, Breese (Ill.) 115; Holliday *v.* People, 5 Gilm. (Ill.) 216; Conner *v.* Bent, 1 Mo. 235; Rankin *v.* Beaird, Breese (Ill.) 123. Effect of executive *pardon* on fines going to county, Holliday *v.* People, 5 Gilm. (Ill.) 216.

nicipal offices and officers. And here it is important to bear in mind the distinction between state officers — that is, officers whose duties concern the state at large, or the general public, although exercised within defined territorial limits — and municipal officers, whose functions relate exclusively to the particular municipality. The administration of justice, the preservation of the public peace, and the like, although confided to local agencies, are essentially matters of public concern; while the enforcement of municipal by-laws proper, the establishment of gas works, of water works, the construction of sewers, and the like, are matters which pertain to the municipality, as distinguished from the state at large.[1] The constitution of Michigan enjoined upon the legislature to "provide for the incorporation and organization of cities and villages;" gave it authority to confer upon them such powers of a local legislative and administrative character as it should deem proper, and contained the further provision that "judicial officers of cities and villages shall be elected, and *all other* [municipal] *officers* shall be elected, or appointed, at such time and in such manner as the legislature may direct;" and it was held by the Supreme Court of the state, in a cause that underwent great consideration, and in which the judges delivered separate opinions, that while the legislature was left free to appoint officers not municipal, such, for example, as a board of police commissioners in and for a city, yet that it was restrained by the above-mentioned provisions, especially by the one last quoted, from itself directly appointing municipal officers, whose duties and authority were plainly and exclusively local, such as the board of water commissioners and board of sewer commissioners for a particular city.[2]

[1] People *v.* Hurlburt, Supreme Court of Michigan, November term, 1871, not yet reported. The distinction mentioned in the text is there accurately drawn, and clearly stated and illustrated in the admirable opinion of *Campbell*, C. J. *Ante*, p. 30. See chapter on Corporate Officers, *post.*

[2] People *v.* Hurlburt, *supra*, distinguished from People *v.* Mahaney, 13 Mich. 481; *ante*, p. 20, and notes. So, under the constitution of Kentucky, which contains a provision that "officers of towns and cities shall be *elected* for such terms, and in such manner, and with such qualifications, as may be prescribed by law," and "shall reside within their respective districts," it was held that the legislature could not authorize the governor to appoint

§ 34. And it has elsewhere been several times determined that the legislature may, unless specially restricted in the constitution, take from a municipal corporation its charter *powers respecting the police* and their appointment, and by statute itself directly provide for a permanent police for the corporation, under the control of a board of police, not appointed or elected by the corporate authorities, but consisting of commissioners named and appointed by the legislature. And a provision in such a law, transferring to such commissioners for the purposes of the new police, the use of the police telegraph, station-houses, watch-boxes, &c., provided by the corporation, is valid, since it only takes city property dedicated to a particular use, and applies it to the same purpose, changing only the agency by which the use is directed; the property is still the city's.[1] So

municipal officers, since the constitution requires that they shall be elected by the voters of the town or city (Speed *v.* Crawford, 3 Met. [Ky.] 207, 1860), but it was also likewise held that it was within the power of the legislature to pass an act depriving the mayor and council of a designated city of the power to elect the *police* force thereof, and establishing, instead, a *board of police* for the city *and the county* in which the city was situate, to be elected by the qualified voters of the city and county, and that this board, thus elected, should select and enrol the permanent police force of the city, which, it was provided, should be taxed to pay them. Police Commissioners *v.* Louisville, 3 Bush (Ky.) 597, 1868.

[1] Baltimore *v.* Board of Police (affirming validity of the Baltimore Police Bill), 15 Md. 376, 1859. There is nothing in the maxim that "Taxation and representation go together," that can preclude the legislature from establishing, in a city, a metropolitan police board, with power to estimate the expenses of the police, and compelling the city authorities to raise, by taxation, the amount so estimated. Every city is represented in the state legislature, and it is for that body to determine how much power shall be conferred by the municipal charters which it grants. People *v.* Mahaney, 13 Mich. 481; see, also, same principle, People *v.* Draper, 15 N. Y. 532, 1857, where the act to establish the metropolitan police district was held constitutional; Police Commissioners *v.* Louisville, 3 Bush 597; Diamond *v.* Cain, 21 La. An. 309, 1869; State *v.* Leovy, *ib.* 538. The cases concur in holding that police officers are, in fact, state officers, and not municipal, although a particular city or town be taxed to pay them. An act which makes the mayor and aldermen of a corporation commissioners of the court house and jail may be repealed by the legislature, and these buildings placed under the control of county or other officers. State *v.* Mayor, R. M. Charlt. (Geo.) 250; see, also, State *v.* Dews, *ib.* 397. A grant to a city to aid in building court house and for educational purposes, is subject, until executed, to legislative resumption and control. Bass *v.* Fontleroy, 11 Texas, 698.

it is constitutionally competent, likewise, to the legislature of a state to direct that the *county* shall pay a portion of the expenses of a police force in a city situated wholly within, and forming part of, the county. It may even direct a county to appropriate part of its revenue already collected in this way, since such legislation is not unconstitutional, as being retrospective in its operation, or as taking away vested rights, or impairing the obligation of contracts, or violating the principles of taxation. As moneys acquired by taxation are not strictly the private property of the county, such legislation is not the application of private property to public use without compensation, since the police board, by virtue of the act creating it, was an agency of the state government and performed public duties.[1]

§ 35. The legitimate authority of the legislature over municipal corporations extends to making provisions concerning their *funds and revenues*, and the authority is not abridged because the purpose to which the revenue is to be appropriated is specified in the charter, and the ground of the doctrine is, that such corporations have no vested rights in powers conferred upon them for civil, political, or administrative purposes. Thus, the legislature may repeal the power it had given to cities to grant licenses for the sale of intoxicating liquors, although the money to be derived from the sale of such licenses was directed to be appropriated to the support

The management and mode of electing trustees of an incorporated academy, which is endowed entirely by the state, may be changed by the legislature at its pleasure. Dart *v.* Houston, 22 Geo. 506; see, also, University of North Carolina *v.* Maultsby, 8 Ire. Eq. 257; University of Alabama *v.* Winston, 5 Stew. & Port. 17; Louisville *v.* University of Louisville, 15 B. Mon. 642; Visitors, &c. *v.* State, 15 Md. 330.

[1] State *ex rel.* St. Louis Police Commissioners *v.* St. Louis County Court (mandamus), 34 Mo. 546, 1864; *contra*, Mayor, &c. *v.* Tows, 5 Sneed (Tenn.) 186. The view of the Supreme Court of Missouri is undoubtedly the correct one.

School districts being public corporations, under legislative control, a law providing that school debts might be paid in bills of the state bank of the state, is valid as against the objection that the legislature had no power to direct that anything except gold and silver should be received in payment of debts. Bush *v.* Shipman, 4 Scam. (Ill.) 190.

of paupers within the city.[1] Such an authority, it was remarked, "gives the city no more a vested right to issue licenses, because the legislature specified the objects to which the money should be applied, than if it had been put into the general fund of the city."[2]

§ 36. Legislative acts respecting municipal corporations not being in the nature of contracts, the provisions thereof may be changed at pleasure where the *constitutional rights of creditors* and others are not invaded. By act of the legislature the separate city of Lafayette was added to and incorporated with the city of New Orleans, with a provision that the added district, which was *less in debt* than the city of New Orleans, should be charged only with its own debts; and by a *subsequent* act of the legislature it was provided, that taxes should be equal and uniform throughout the entire limits of the city, the effect of which was to increase the amount of taxes to be raised within that portion of the corporation which was for-

[1] Gutzweller *v.* People, 14 Ill. 142, 1852.

[2] Gutzweller *v.* People, 14 Ill. 142, 1852, *per Caton*, J. See, also, Richland Co. *v.* Lawrence Co. 12 Ill. 1, 1850; People *v.* Power, 25 Ill. 187. By the charter of a municipal corporation there was granted to it sole power to grant licenses to sell spirituous liquors within its limits, and to appropriate the money arising therefrom to city purposes. Subsequently the legislature passed an act directing the money thus arising to be paid by the corporation to an academy located within the town. The municipal corporation refused to pay over to the academy an amount received for licenses after the passage of the last named act, and the academy brought an action to recover it. The court held the subsequent act to be unconstitutional, and that the town was not liable. The court were of opinion, that, by its charter, the town had a vested right in the profits arising from licenses. It admitted that the legislature might altogether take away from the town the power to grant licenses; but if it allowed the power to remain, it denied the right of the legislature "to make a different disposition of the funds arising from such licenses, from that contained in the charter, unless with the consent of the corporation." Trustees of Aberdeen Academy *v.* Aberdeen, 13 Sm. & Marsh. (Miss.) 645, 1850. See, also, Aberdeen *v.* Saunderson, 8 *ib.* 663. The doctrine that the town corporation had a vested right in profits arising from licenses, cannot, we think, be sustained, and is not in harmony with the decisions elsewhere.

County and township funds are under legislative control. County *v.* State, 11 Ill. 202; County *v.* County, 12 Ill. 1; Dennis *v.* Maynard, 15 Ill. 477; Love *v.* Schenck, 12 Ire. Law, 304; Love *v.* Ramsour, *ib.* 328.

merly the city of Lafayette. A bill was filed by residents and property owners of the annexed district to enjoin the collection of the excess of taxes beyond the amount fixed by the act incorporating the annexed district into the "old city," claiming that the act was a contract, and the levy of taxes under the latter act, so far as regards debts due antecedently to the annexation, violated the vested rights of the inhabitants of the annexed district. The Supreme Court, on the ground that public corporations are wholly under the control of the legislature, which has the power to provide in what manner taxes shall be levied for their support, and how their debts shall be paid on their dissolution, held the act authorizing increased taxation to be valid, and dismissed the bill.[1]

§ 37. The power of the legislature to alter and abolish municipal corporations, to erect new corporations in the place of the old, to add to the old, or to carve out of the old a new corporation, or the power to divide and dispose of the property held by such corporations for municipal purposes, is not defeated or affected by the circumstance that the corporation is, by its charter, made the *trustee of a charity*, or of other private rights and interests. Where the legal existence of the municipal trustee is destroyed by legislative act, the Court of Chancery will assume the execution of the trust, and, if necessary, will appoint new trustees to take charge of the property and carry into effect the trust.[2]

§ 38. The supremacy of the legislative authority over municipal corporations is not, however, in all respects, unlimited; but the limitations must be sought either in the national or state constitution, and if not there found, in terms, or by fair implication, they do not exist. In England, it is settled that the crown has no power, without the consent of those to be

[1] Layton *v.* New Orleans, 12 La. An. 515, 1857. See, also, Girard *v.* Philadelphia, 7 Wall. 1, 1868; People *v.* Hill, 7 Cal. 97, 1857; *post*, Chap. VIII.

[2] Girard *v.* Philadelphia, 7 Wall. 1, 1868; Montpelier *v.* East Montpelier (division of town and contest as to trust property held for the benefit of the inhabitants of the original township), 29 Vermont (3 Wms.), 12, 1856; same controversy at law, 27 Vermont, 704. See *infra*, Sec. 47, and chapters on Corporate Property and Remedies against Illegal Corporate Acts, *post*.

affected thereby, to alter or abolish municipal charters, or to impose new ones on the corporation. But parliament may create new corporations, or abolish or alter charters, or impose new ones, at its will, and without the consent of the inhabitants. And so may the state legislatures in this country, if there be no special constitutional restriction, as generally there is not, upon the power.[1]

§ 39. It may assist to an understanding of the extent of legislative power over municipal corporations proper (incorporated towns and cities) to observe, that these, as ordinarily constituted, possess, according to many courts, a double character—the one *governmental, legislative*, or *public;* the other, in a sense, *proprietary* or *private.* The distinction between these, though sometimes difficult to trace, is highly important, and is frequently referred to, particularly in the cases relating to the implied or common law liability of municipal corporations for the negligence of their servants, agents, or officers in the execution of corporate duties and powers. On this distinction, indeed, rests the doctrine of such implied liability.[2] In its governmental or public character, the corporation is made, by the state, one of its instruments, or the local depositary of

[1] St. Louis *v.* Allen (extension of city limits), 13 Mo. 400, 1850; St. Louis *v.* Russell, 9 Mo. 503, 1845. It is justly observed, that "Most, if not all, of the leading cases in the books, involving the question of the inviolability of municipal charters, in the *English* courts, arose between the *prerogative of the crown* and the *corporation.* The right or power of *parliament* in England, or of the legislature here, would present (and was decided to present) quite a different question." *Per Nelson,* J., in People *v.* Morris, 13 Wend. 325, 334, 1835; Philadelphia *v.* Field, 58 Pa. St. 320, 1868.

[2] *Ante,* p. 33. "The distinction is well established between the responsibilities of towns and cities for acts done in their *public capacity,* in the discharge of duties imposed on them by the legislature for the public benefit, and for acts done in what may be called their *private character,* in the management of property and rights voluntarily held by them for their own immediate profit or advantage, as a corporation, although inuring, of course, ultimately to the benefit of the public." *Per Gray,* J., in Oliver *v.* Worcester, 102 Mass. 489, 499, 1869; S. P. Detroit *v.* Corey, 9 Mich. 165, 184, 1861. In the one case, no private action lies unless it be expressly given; in the other, there is an implied or common law liability for the negligence of their officers in the discharge of such duties. In further illustration of this alleged dual character, the reader is referred to the cases cited in the next note.

certain limited and prescribed political powers, to be exercised for the public good, on behalf of the state, and not for itself. In this respect it is assimilated, in its nature and functions, to a county corporation, which, as we have seen, is purely part of the governmental machinery of the sovereignty which creates it. Over all its civil, political, or governmental powers, the authority of the legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in some peculiar provision of the constitution of the particular state. But in its proprietary or private character, the theory is, that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the particular corporation as a distinct *legal personality*, and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded as *quoad hoc* a private corporation, or, at least, not public in the sense that the power of the legislature over it is omnipotent.[1]

[1] West. Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 175; *ib.* 185; Bailey *v.* Mayor, &c. of New York, 3 Hill, 531; Small *v.* Danville, 51 Maine, 359; Jones *v.* New Haven, 34 Conn. 1; Western College *v.* Cleveland, 12 Ohio St. 375, 1861; Howe *v.* New Orleans, 12 La. An. 481; Martin *v.* Mayor, &c. 1 Hill, 545; Buttrick *v.* Lowell, 1 Allen, 172; Oliver *v.* Worcester, 102 Mass. 489, 1869; Touchard *v.* Touchard, 5 Cal. 306; Gas Co. *v.* San Francisco, 9 Cal. 453; Commissioners *v.* Duckett, 20 Md. 468; West *v.* Brookport, 16 N. Y. 161, note; Louisville *v.* University of Louisville, 15 B. Mon. 642; Louisville *v.* Commonwealth, 1 Duvall (Ky.), 295; Weightman *v.* Washington, 1 Black (U. S.), 39, 1861; Reading *v.* Commonwealth, 11 Pa. St. 196, 1849; Richmond *v.* Long's Admr. 17 Gratt. (Va.) 375; De Voss *v.* Richmond, 18 Gratt. 338; S. C. 7 Am. Law Reg. (N. S.) 589; Detroit *v.* Corey, 9 Mich. 165, 184, 1861; People *v.* Hurlburt, Supreme Court of Michigan, 1871, opinion of *Cooley*, J.

This division of the powers and duties of a municipal corporation into two classes, one public and the other private, is, to our mind, far from satisfactory; and the *private* character thus ascribed to it, difficult exactly to comprehend. In what sense are powers conferred and to be exercised for the good of all the people of the place, private? Wherein do such powers, in their origin or nature, differ from those admitted to be public? Are not all powers conferred upon municipalities, whether many or few, given, and given only, for their better regulation and government, and to promote their welfare as parts of the state at large? The small municipality, with few and simple powers, is no more completely under the supreme dominion of the legislature than the more populous one, requiring for

§ 40. It is, perhaps, at present, impossible to state, with confidence, what *limitations exist upon the power of the legislature* over municipal corporations, as ordinarily constituted. It is practicable only to refer to the leading cases upon the subject, and attempt to extract the principles upon which they rest.

It is decided that a grant by the legislature of the state to a town, of the right to establish a *ferry*, is not in the nature of a contract, hence the grant is repealable, and the corporation may constitutionally be deprived of the franchise.[1] So an act conferring upon a municipal corporation a *public trust*, and the *title to land* as ancillary to its execution, is not a contract, but may be repealed at the will of the legislature.[2] But sup-

its proper government organs and powers peculiar to itself. Are the latter, therefore, *private?* If so, it must be in a qualified and peculiar sense. *Ante*, p. 33. Contracts in favor of the creditor are protected by the national constitution; but as against the state, what private powers and rights can a municipal corporation be said to have, when it is within the power of the state, which breathed into it the breath of life, utterly to extinguish its existence at pleasure. The distinction originated with the courts, to promote justice and to escape technical difficulties in order to hold such corporations liable to private actions. On this subject, the opinion of Chief Justice *Denio*, in Darlington *v.* Mayor, &c. 31 N. Y. 164, 1865, may be read with profit. The Chief Justice there asserts the unlimited power of the legislature over municipal corporations and their property. He maintains that such corporations are altogether public, and all their rights and powers public in their nature, and that their property, though held for income or sale, and unconnected with any use for the purposes of the municipal government, is under the control of the legislature, and not within the provisions of the constitution protecting private property. He denies the correctness of the distinction taken in Bailey *v.* The Mayor, &c. of New York, 3 Hill, 531, and other cases, between the public and private functions of city governments, and maintains that as respects *the state*, all their powers and functions are public. He affirms that the legislature may compel a municipal corporation to submit to arbitration claims to which private corporations and natural persons would be entitled by the constitution to a trial by jury. See, as to jury, Dunsmore's Appeal, 52 Pa. St. 374. Holding contrary view, Plimpton *v.* Somerset, 33 Vt. 283, 1860. See, also, chapters on Municipal Courts, Property, and Ordinances, *post.*

[1] East Hartford *v.* Hartford Bridge Co. 10 How. 511, 1850; S. C. 16 Conn. 149; 17 *ib.* 79; Trustees *v.* Tatman, 13 Ill. 30; Police Jury *v.* Shreveport, 5 La. An. 661, 1850; Darlington *v.* Mayor, 31 N. Y. 164, 202, 203, *per Denio*, C. J.

[2] People *v.* Vanderbilt, 26 N. Y. 287, 1863. Where an act incorporating a city donated lands included therein, for the erection of certain public buildings, and the residue to be applied to education, and the charter was after-

pose the legislature had granted in fee, to the corporation, a tract of land within its limits, is such a grant, or an ordinary grant of land to the corporation from others, a contract as respects the state, and protected by the constitution from legislative invasion, the same as if the grant had been made to, or the property acquired by, an individual or private corporation? The question thus stated has never arisen directly for adjudication in the Supreme Court of the United States; but, in the celebrated Dartmouth College Case, two of the judges expressed the opinion that the legislative control over public and municipal corporations was not so transcendent and absolute as to extend to an arbitrary divestiture of its private property and the destruction of rights of a private nature. On the other hand, it is the opinion of a distinguished and able judge in New York, in a case already mentioned, that the authority of the legislature over the powers, rights, and property of municipal and public corporations, is, as respects the corporations, quite without limit.[1] The weight of opinion seems to be in favor of the doctrine, that there may be, in such corporations, rights under contracts and grants which are beyond destruction by the legislature, though not beyond legitimate legislative authority and control;[2] but in the present state of the decisions the subject cannot be fairly said to be settled.

wards repealed, it was held that until the trust had been executed it was competent for the legislature to change or abolish it, and that the repeal of the charter extinguished the trusts, they being public, unexecuted, and conditional. Bass *v.* Fontleroy, 11 Texas, 698–708, 1854. Where an act of the legislature, instead of granting certain moneys received by the state for the purposes of internal improvements to certain counties absolutely, simply appropriated it *to be drawn* by such counties and expended by them in the improvement of roads, &c., it was held that before its expenditure by the counties the legislature had entire control over the fund, and might resume or change the purposes for which it was originally designed to be expended, or provide for the payment by an old county, which had received, but not expended, its proportion of such fund, to a new county erected out of the old county of an equitable share of the fund. Richland County *v.* Lawrence County, 12 Ill. 1, 1850, distinguished from Hampshire *v.* Franklin, 16 Mass. 76; *post*, Chap. VIII.

[1] *Denio*, C. J., in Darlington *v.* New York, 31 N. Y. 164, 1865.

[2] In Richland County *v.* Lawrence County, 12 Ill. 1, 1850, while the plenary power of the legislature over the public, civil, or political rights of public corporations was asserted and declared, still it was admitted by the very able and cautious judge who delivered the opinion, that "the state may

§ 41. It is an interesting inquiry, which has not yet arisen for judgment, whether the legislature of the state has the right, in virtue of its control over municipal corporations, to annul or interfere with *contracts* between two municipalities. If a municipal corporation, however, becomes indebted, the *rights of the creditors* cannot, it is clear, be impaired by any subsequent

make a contract with, or a grant to, a public municipal corporation which it could not subsequently resume; but in such case the corporation is to be regarded as a private company." *Per Trumbull*, J. See West. Sav. Fund Society *v.* Philadelphia, 31 Pa. St. 175; *ib.* 185.

"But while the legislative power (to enlarge, restrain, or even destroy municipal corporations, as the public interest may require) may be exercised over public and municipal corporations, it has as uniformly been held that towns, and other public corporations, may have private rights and interests vested in them under their charter; and as to those rights, they are to be regarded and protected the same as if they were the rights and interests of individuals or of private corporations, and grants of property in trust for other than corporate and municipal use (that is, as we understead, for private, as distinguished from public, purposes), are no more the subject of legislative control than are the private and vested rights of individuals." *Per Isham*, J., *arguendo*, in Montpelier *v.* East Montpelier, 29 Vermont (3 Wms.), 12, 19, 1856; S. C. 27 *ib.* 704.

Legislative grants of property to private, and, it seems, also, to public and municipal, corporations, cannot be repealed so as to divest the rights of the grantees. Town of Pawlet *v.* Clark, 9 Cranch (U. S.), 292, 336, 1815, *per Story*, J., *obiter;* Terrett *v.* Taylor, *ib.* 43, 52. In this last case, Mr. Justice *Story* remarks, *arguendo:* "In respect, also, to *public* corporations, which exist only for public purposes, such as counties, towns, cities, &c., the legislature may, under proper limitations, have a right to change, modify, enlarge, or restrain them, *securing, however, the property*, for the uses of those for whom and at whose expense it was originally purchased." Followed by Chancellor Kent, 2 Com. 305; by Mr. Justice *Washington*, Dartmouth College Case, 4 Wheat. 518, 663. In the last case, Mr. Justice *Story* said: "But it will hardly be contended, that even in respect to such [public] corporations, the legislative power is so transcendent that it may, at its will, take away the *private property* of the corporation, or change the uses of its private funds acquired under the public faith." 4 Wheat. 518, 694, *obiter*. And such is Mr. Justice *Cooley's* view in his valuable treatise. Constitutional Limitations, 238. He reiterates in his learned opinion in People *v.* Hurlburt, Supreme Court of Michigan, 1871. In Grogan *v.* San Francisco, 18 Cal. 590, Mr. Chief Justice *Field*, delivering the opinion of the Supreme Court of California, takes the ground that the real estate or private property of a municipal corporation is protected by the clause in the national constitution securing the inviolability of contracts; that all legislative authority over it must be exercised in subordination to this guaranty, and that it is subject to legislative control to the same extent, but to no greater extent, than all other property in the state. But in Darlington *v.* Mayor, &c. of New York,

legislative enactment.[1] Thus, where an act of the legislature was passed to provide for the payment of the debts of a municipal corporation and authorizing the creation of a *sinking fund*, to be deposited and applied in a particular manner, and where creditors acting thereunder have surrendered the evidences of their debts and received new bonds, for the payment of which the fund stands pledged by the act, it is not competent — because it impairs the obligation of contracts — for a subsequent legislature, in providing for the liquidation of the corporate debts, to give a different destination to the sinking fund by changing the depository of the fund.[2] So where the effect of an act of the legislature authorizing a city to *fund its floating debt* was, in substance, a pledge to those who surrendered their claims and received new obligations, to trustees of a portion of her revenues and property, to be applied to the payment of her obligations in a specified mode, this, if acted on, constitutes a contract which cannot be materially altered, either by the municipality or the legislature, without the sanction of the creditors; but it was held that a subsequent act,

31 N. Y. 164, 193, 205, Mr. Chief Justice *Denio* observes: "Let us suppose the city to be the owner of a parcel of land not adapted to any municipal use, but valuable only for sale to private persons for building purposes, or the like; no one, I think, can doubt but what it would be competent for the legislature to direct it to be sold, and the proceeds devoted to some municipal or other public purpose, within the city, as a court house, a hospital, or the like. * * It is unnecessary to say whether the legislative jurisdiction would extend to diverting the city property to other public use than such as concerns the city and its inhabitants." And he considers the expression of Chancellor Kent (2 Com. 305) and of Mr. Justice *Story*, that where a municipal corporation is empowered to have and to hold private property, such property is invested with the security of other private rights, to mean only that it possesses such rights against wrong-doers, and not that it is exempt from legislative control. 31 N. Y. 164, 196.

[1] Van Hoffman *v.* Quincy, 4 Wall. 535; Butz *v.* Muscatine, 8 *ib.* 575; Lee County *v.* Rogers, 7 *ib.* 175; Furman *v.* Nichol, 8 *ib.* 44; Woodruff *v.* Trapnall, 10 How. 206; Bronson *v.* Kinsie, 1 *ib.* 316; Lansing *v.* County Treasurer, 1 Dillon Cir. C. R. 522; Muscatine *v.* Railroad Company, *ib.* 536; Soutter *v.* Madison (act forbidding city to levy taxes to pay judgments held void), 15 Wis. 30; Western Savings Fund Society *v.* Philadelphia, 31 Pa. St. 175 185. Further, see Chapter on Contracts, *post.*

[2] Liquidators *v.* Municipality, 6 La. An. 21, 1851. As to *sinking fund*, see Terry *v.* Bank, 18 Wis. 87; *post*, Chapter on Charters. *Fraudulent transfers* of property by municipal corporations, Smith *v.* Morse, 2 Cal. 524.

simply changing the mode of levying taxes, and which did not and could not affect the result or impair the security of the creditors, was not invalid.[1] So, also, where the legislature authorized an indebted city to issue bonds to a specified amount, in payment of a like amount of its outstanding bonds, and, among other provisions, plainly intended to induce creditors to make the exchange, was one prohibiting the city from thereafter issuing its bonds, "except in payment of its bonded debt," and this authority having been acted on, and the arrangement accepted by the creditors, and new bonds issued, it was decided by the supreme court of Wisconsin that the prohibition against the issue of further bonds, constituted, in favor of the holders of the new bonds, a contract, which the legislature could not impair by a subsequent enactment, authorizing the municipality to issue additional bonds for other purposes.[2]

§ 42. But authority to a city to borrow money, and to tax all the property therein to pay the debt thus incurred, does not necessarily deprive the state of the power to modify taxation so as to exempt portions of the property, if the rights of creditors be not thereby impaired.[3] So authority given in a railroad charter to a county to take stock and issue bonds therefor, if a majority of the voters so determine, is not a contract, but a mere authority conferred upon the county in its public capacity, and may be repealed at any time before the subscription has been made.[4]

§ 43. The legislature, as the trustee for the general public, has full control over the *public property* and the *subordinate rights* of municipal corporations. Accordingly, it may author-

[1] People *v.* Bond, 10 Cal. 563, 1858. And see People *v.* Wood, 7 Cal. 579, 1857.

[2] Smith *v.* Appleton, 19 Wis. 468, 1865. Extent of legislative power over *municipal indebtedness* as against the municipality, see City *v.* Lamson, 9 Wall. 477, and read, in connection therewith, Campbell *v.* Kenosha, 5 Wall. 194, in effect overruling the practical application of Foster *v.* Kenosha, 12 Wis. 616, 1860; *post*, chapters on Charters and Contracts.

[3] Gilman *v.* Sheboygan, 2 Black, 510, 1862; Muscatine *v.* Railroad Company, 1 Dillon C. C. 536.

[4] Aspinwall *v.* County of Jo Daviess, 22 How. 364, 1859. If not indeed at any time before it is paid for: People *v.* Coon, 25 Cal. 635.

ize a railroad company to occupy the streets in a city without its consent and without payment, but it could not, probably, authorize the taking of the private property of a city by a railroad company, except for public purposes, and upon compensation being made.[1] It may authorize corporations to make contracts, but it is more doubtful whether it can make contracts for them, since the essence of a contract consists in the agreement of the parties. And on this view it has been held, in Vermont, that the legislature cannot, *without the consent* of a municipal corporation, appoint an agent for it, and authorize him, as such agent, to purchase property and bind the corporation to pay for it.[2] So the supreme court of Illinois has, very recently, decided that the legislature, under peculiar provisions in the constitution of that state, has no power to compel a city to incur a debt against its will.[3] Questions of this kind de-

[1] Darlington *v.* Mayor, &c. 31 N. Y. 164, 1865; Reynolds *v.* Stark County, 5 Ohio, 204; 5 Ohio St. 113; Clinton *v.* Railroad Company, 24 Iowa, 455, 1868; Louisville *v.* University of Louisville, 15 B. Mon. 642, 1855. See, further, chapters on Streets and on Dedication, *post;* People *v.* Kerr, 27 N. Y. 188; Mercer *v.* Railroad Company, 36 Pa. St. 99; Mayor, &c. *v.* Hopkins, 13 La. An. 326; Reading *v.* Commonwealth, 11 Pa. St. 196.

[2] Atkins *v.* Randolph, 31 Vt. 226, 1858. The case was this: Plaintiff sued the town of Randolph in assumpsit for liquor sold to an "agent" appointed by the county commissioners to purchase liquors (under the act of 1852, "to prevent the traffic in intoxicating liquors"), at the expense of the town for which he was appointed. The town never gave any assent, express or implied, to this appointment; nor did it receive any benefit from the sale of the liquors, or have any knowledge that the agent was purchasing liquors on its credit. The court held the act of 1852 unconstitutional, and that the plaintiffs could not recover. The decision was put mainly upon the ground that the legislature could not authorize a binding contract to be made creating a debt against a public corporation without its consent. *Bennett*, J., dissented, not on the ground that the corporation was bound by force of any contract, but because the act of 1852 imposed a duty upon the towns, as *municipal corporations*, to pay for the liquors, and this for *public* purposes, and to carry out a *police* regulation. Chief Justice *Denio* criticises this case, and considers it as "standing upon no principle" — Darlington *v.* Mayor, &c. of New York, 31 N. Y. 164, 205, 1865. And see Philadelphia *v.* Field, 58 Pa. St. 320, 1868.

[3] People *v.* Chicago (Lincoln Park Case), 51 Ill. 17, 1869; People *v.* Salomon (South Park Case), *ib.* 37; Howard *v.* Drainage Company, *ib.* 130. Though the reasoning of the court is general, yet the point decided, that the city could not be compelled to contract a debt against its consent, was influenced by, if it does not rest upon, a constitutional provision (Art. IX.

pend, for correct solution, not only upon the constitutional provisions in the particular state, but also, perhaps, upon the nature of the debt which the municipality is ordered to create. If there is no special limitation in the constitution, and the debt is one to be incurred in the discharge of a public duty, which it is proper for the legislature to impose upon the municipality, it can constitute no objection to the validity of the act, that the debt or liability is to be created without its consent. Thus, in the absence of constitutional restriction, it has been decided, and the decision is doubtless correct, that it is competent for the legislature to direct a municipal corporation to build a bridge over a navigable water course within its limits, or the state may appoint agents of its own to build it, and empower them to create a loan to pay for the structure, payable by the corporation.[1]

§ 44. The fact that a claim against a municipal or public corporation is not such an one as the law recognizes as of *legal obligation*, has been decided to form no constitutional objection to the validity of a law imposing a tax and directing its payment;[2] but the validity of legislation of this character,

Sec. 5), which was construed to restrict the legislature from granting the right of local or corporate taxation to any other than the corporate authorities of the municipality or district to be taxed. Compare Darlington *v.* Mayor, &c. of New York, 31 N. Y. 164.

The general propositions in the text as to the restrictions on legislative power over municipal corporations will be found to be sustained by the following cases: Atkins *v.* Randolph, 31 Vt. 226, 1858; White *v.* Fuller, 39 Vt. 193; Louisville *v.* The University, 15 B. Mon. 642; Western Savings Fund Society *v.* Philadelphia, 31 Pa. St. 175, 185; Montpelier *v.* East Montpelier, 29 Vt. 12; Poultney *v.* Wells, 1 Aik. (Vt.) 180; Trustees *v.* Winston, 5 Stew. & Port. (Ala.) 17; Norris *v.* Trustees Abington Academy, 7 Gill & Johns. (Md.) 7; Regents of University *v.* Williams, 9 *ib.* 365; Trustees of Academy *v.* Aberdeen, 13 Sm. & Mar. (Miss.) 645; Brunswick *v.* Litchfield, 2 Maine (2 Greenl.), 28, 32.

[1] Philadelphia *v.* Field, 58 Pa. St. 320, 1868, approving Thomas *v.* Leland, 24 Wend. 65; *supra*, Sec. 30, note, and cases cited. But the legislature would not, of course, possess such extensive powers over a private corporation. Erie *v.* Canal, 59 Pa. St. 174.

[2] Guilford *v.* Supervisors, &c. 13 N. Y. (3 Kern.) 143, 1855. See Mr. Sedgwick's opinion of this legislation, Const. and St. Law, 313, 314. The same principle was applied in Brewster *v.* Syracuse, 19 N. Y. 116, 1859, where it was decided by all of the judges of the Court of Appeals that the

if it interferes with what has been called the *private* contracts of such corporations, can only be sustained on the ground that such contracts, so far as the corporations are concerned, are under the absolute control of the legislature, and not within the protection of the national constitution — a principle which cannot yet be said to be incorporated into our jurisprudence. The cases go no further, probably, than to assert the doctrine that it is competent for the legislature to compel municipal corporations to recognize and pay debts not binding in law, and which, for technical reasons, could not be enforced in equity, but which, nevertheless, are just and equitable in their character, and involve a moral obligation.[1] To this extent and with this limitation, the doctrine seems unobjectionable in principle, although it asserts a measure of control over municipalities, in respect of their duties, which does not exist as to private corporations or individuals.

legislature has the power to authorize the levy of a tax for the purpose of paying to one who has constructed a municipal improvement (a street sewer) an addition to the contract price, which the corporation was forbidden to pay by its charter. The court did not consider that there was any contract in the case, and sustained the legislation on the ground that it was warranted by the taxing power, which, in that state, was not restrained, thus leaving it in the discretion of the legislature to recognize and direct the payment of claims founded in equity and justice, or in gratitude or charity. People *v.* Mayor, &c. of Brooklyn, 4 Comst. 419. And see Thomas *v.* Leland, 24 Wend. 65, 1840; Shelby Co. *v.* Railroad Co. 5 Bush (Ky.), 225; Philadelphia *v.* Field, 58 Pa. St. 320, 1868. This seems to be carrying the doctrine of the control of the legislature over public corporations to its extreme limit. See Mr. Justice *Cooley's* views, Const. Lim. 380, 491, notes. The Supreme Court of California has followed and approved Guilford *v.* Supervisors. Blanding *v.* Burr, 13 Cal. 343, 1859. Under special provisions of Michigan constitution, see People *v.* Onandaga, 16 Mich. 254. Where one county is under a moral obligation to reimburse another county for certain expenses, the legislature may give this a legal effect by a subsequent act. Lycoming *v.* Union, 15 Pa. St. 166, 1850. Right of trial by jury may be denied by the legislature to municipal corporations, these being mere creatures of its policy, with such rights only as it sees proper to confer. Borough of Dunsmore's Appeal, 52 Pa. St. 374; but see, *supra*, Sec. 39, note on p. 40.

[1] Blanding *v.* Burr, 13 Cal. 343, 1859; Lycoming *v.* Union, 15 Pa. St. 166; Guilford *v.* Supervisors, 13 N. Y. 143, 1855; Brewster *v.* Syracuse, 19 N. Y. 116, 1859; Thomas *v.* Leland, 24 Wend. 65, 1840; Hasbrouck *v.* Milwaukee, 21 Wis. 217, 1866; Smith *v.* Morse, 2 Cal. 524; Grogan *v.* San Francisco, 18 Cal. 590; Burns *v.* Clarion County, 62 Pa. St. 422.

§ 45. Accordingly, it has been decided recently, in Maryland, that, as against the *abutters*, the legislature could not ratify an assessment for a local improvement in front of their property, and which had been adjudged to be void, and compel them to pay for the same.[1] In the case just mentioned, the legislature, in an act relating to the grading and paving of an avenue in the city of Baltimore, among other things, required, as preliminary to proceedings thereunder, that the mayor and council of the city should determine the proposed work to be consistent with the public good. An application, by property owners, for the improvement, was made to the city commissioner instead of the mayor and council, and the commissioner determined to grade the avenue, awarded the contract, and the contractor did the work at the cost of over $100,000. The abutters instituted no proceeding to stop the work, and after it was completed the city passed an ordinance ratifying the contract to grade, and all the acts of the officers of the city in relation to the grading of the avenue. An assessment being made upon their property, to pay the expense of the grading, they filed a bill for an injunction and relief, and it was judicially determined that the proceedings of the city commissioner were *coram non judice* and void, and that they could not be ratified by ordinance.[2] After this judicial determination, the legislature passed an act directing the city to pay the contractors for the work done by them and accepted by the city, to borrow the money for the purpose, and levy a tax for its repayment, which the city did. But at the same session, the legislature, to reimburse the city treasury, empowered the city to collect from the abutters on the avenue graded the amounts which had been assessed and ascertained by the city commissioner, and this last act was held by the Court of Appeals to be void, because it was an assumption of judicial power by the legislature, and, in effect, a legislative reversal of the former judgment of the court.

§ 46. In general, however, the legislature may, by subsequent act, validate and confirm previous acts of the corpora-

[1] Baltimore *v.* Horn, 26 Md. 194, 1866.

[2] Baltimore *v.* Porter, 18 Md. 284, 1861.

tion otherwise invalid.[1] Merely because such legislation, in matters not relating to crimes, is retrospective, does make it void. If, in addition to its being retrospective, it unjustly abrogates vested rights, and, without reasonable cause, imposes upon third persons new duties in respect to past transactions, it may be void because in conflict with the constitution.[2]

§ 47. While it is undeniable that the legislature has full control over public corporations, and over the funds which belong to them as such, and held for strictly corporate purposes; yet where, by authority of law, such corporations hold property or funds *in trust for specific uses*, it is left in doubt by the cases how far the legislature can, unless the uses be strictly public, interfere with or control such trust property or funds. Certain it is, that without legislative authority, a municipal corporation holding the legal title to property in trust, cannot use the funds derived from such property for corporate purposes, or, indeed, for any except the trust purposes.[3]

[1] Bridgeport *v.* Railroad Co. 15 Conn. 475, 1843, in which it was held, that the legislature might validate prior subscription of city to stock of railroad company; S. P. Winn *v.* Macon, 21 Geo. 275, 1857; McMillen *v.* Boyles, 6 Iowa, 304; *ib.* 391; New Orleans *v.* Poutz, 14 La. An. 853; Bissell *v.* Jeffersonville, 24 How. 287, 295, 1860; Achison *v.* Butcher, 3 Kansas, 104, 1865; Frederick *v.* Augusta, 5 Geo. 561; Truchelut *v.* City Council, 1 Nott & McCord, (South Car.) 227; Cooley Const. Lim. 371, 379.

[2] Bridgeport *v.* R. R. Co. 15 Conn. 475, 497, and cases cited *per Church*, J. Laws passed to remedy defective execution of powers by public corporations, or their officers, are valid, though retrospective in their operation, unless they contravene some provision of the state constitution. State *v.* Newark, 3 Dutch. (N. J.) 187, 1858; Bissell *v.* Jeffersonville, 24 How. 287, 295, where such curative acts are said to be valid when contracts are not impaired, or the rights of third persons injuriously affected.

It is competent for the legislature to validate a city ordinance which had become null and void for want of being recorded, and to provide that the omission to record shall not impair the lien of the assessments against the lot owners. Schenley *v.* Commonwealth, 36 Pa. St. 29, 1859. The legislature may ratify, and thereby make binding, an unauthorized municipal subscription to the stock of an incorporated theatre company. Municipality *v.* Theatre Co. 2 Rob. (La.) 209, 1842; but, *quere*, whether, if the legislature had the power, the act in this case was properly held to be a ratification. See, further, chapter on Contracts, *post*.

[3] White *v.* Fuller, 39 Vt. 193; *ante*, Sec. 37; Montpelier *v.* East Montpelier (contest as to trust property on division of town), 27 Vt. (1 Wms.) 704, 1854; same controversy in chancery, 29 Vt. (3 Wms.) 12. See, also, Trustees, &c.

v. Bradbury, 2 Fairf. (Me.) 118; Poultney *v.* Wells, 1 Aik. (Vt.) 180; Plymouth *v.* Jackson, 15 Pa. 44; Harrison *v.* Bridgeton, 16 Mass. 16; Daniel *v.* Memphis, 11 Humph. (Tenn.) 582; Trustees of Academy *v.* Aberdeen, 13 Sm. & Mar. (Miss.) 645, as to which, *quere.* Aberdeen *v.* Sanderson, 8 *ib.* 670; Chambers *v.* St. Louis, 29 Mo. 543; Holland *v.* San Francisco, 7 Cal. 361; Girard *v.* Philadelphia, 7 Wall. 1. See, *post*, chapters on Corporate Property and Remedies Against Illegal Corporate Acts. A conveyance was made in 1743, by the proprietors of the lands, to the selectmen of North Yarmouth, of "all the flats, sedge banks, and muscle beds in said town, lying below high water mark," "for the sole use and benefit of the present inhabitants, and of all such as may or shall forever inhabit and dwell in said town," &c. It was decided that this property was held by the town as a *public* corporation, subject to legislative control, *in trust* for the use of all of the inhabitants, and that upon a division of the town, it was competent for the legislature to provide that the original town should still hold such property in trust for the inhabitants of both towns. North Yarmouth *v.* Skillings, 45 Maine, 133, 1858.

To another town in Maine, lands were granted by Massachusetts prior to the separation of Maine therefrom, for the *use of its schools.* The legislature, in 1803, on the application of the town, authorized the sale of the lands, and gave to certain designated *trustees* the right to control the funds raised by the sale of the lands. This was considered as constituting a *contract*, and it was accordingly held that a subsequent act of the legislature, authorizing the town to choose a new set of trustees, and directing the first trustees to deliver over the trust property, was, agreeably to the principles settled in the Dartmouth College Case, unconstitutional and void. The Trustees, &c. *v.* Bradbury, 11 Maine, 118, 1834; Yarmouth *v.* North Yarmouth, 34 Maine, 411, 1852. In this last case the trustees of the funds were a *private* corporation, and not subject to legislative control. In North Yarmouth *v.* Skillings, 45 Maine, 133, 1858, the trustees of the funds or property in question were a *public* corporation, and subject to such control. The rule as to private and public corporations is well exemplified in these two cases. See, also, Norris *v.* Abington Academy, 7 Gill & Johns. (Md.) 7; Bass *v.* Fontleroy, 11 Texas, 698; Louisville *v.* University of Louisville, 15 B. Mon. 642.

In the State *v.* Springfield Township, 6 Ind. (Porter) 83, 1854, it was held, that a law of the state (act of 1852), so far as it diverted the proceeds of the sale of the sixteenth section (granted by act of congress of April 19, 1816) from the use of schools in the *congressional* township where the land was situated, to the use of the school system of the state at large, was in contravention of that section of the state constitution (Sec. 7, Art. VIII.) which provides, that "All trust funds, held by the state, shall remain inviolate, and be faithfully and exclusively applied to the purpose for which the trust was created."

CHAPTER V.

Municipal Charters.

General Municipal Powers.— Their Nature and Construction.

§ 48. This chapter will treat of Municipal Charters, and the principles upon which they are construed, and of the general nature of the powers which they confer upon the corporation or upon its legislative or governing body. The subject will be considered under the following heads: 1. Charters Defined. 2. Judicially Noticed. 3. Proof of Corporate Existence. 4. Repeal and Amendment of Charters. 5. Conflict between General Laws and Special Charters. 6. Extent of Corporate Powers, Limitations Thereon, and Canons of Construction. 7. Usage as affecting Powers and Their Interpretation. 8. Discretionary Powers. 9. Public Powers Incapable of Delegation. 10. Or Surrender. 11. Mandatory and Discretionary Powers. 12. Exemption of Revenues from Judicial Seizure, and herein of Garnishment.

Charters Defined.

§ 49. We have before seen that, in this country, municipal corporations are created by legislative act, either in the form of a special charter or by general incorporating statutes.[1] A municipal charter, granted by the crown in England, is a written instrument, made in the form of letters patent, with the great seal appended to it, addressed to all the subjects, and constituting the persons therein named, and their successors, a body corporate for or within the place therein specified, and prescribing the powers and duties of the corporation thereby created. But such charters are inoperative until accepted.[2] Here, as we have elsewhere shown, the legislature creates, al-

[1] *Ante*, p. 56, Sec. 19; p. 57, Sec. 20.

[2] *Ante*, p. 45, Sec. 15; p. 63, Sec. 23.

ters, and, in the absence of constitutional restriction, can destroy, municipal and public corporations at its will, and it invests them with such powers, and requires of them such duties, as it deems most expedient for the general good, and for the benefit of the particular locality.[1] No precise form of words is necessary to create a corporation, and a corporation may be created by implication.[2]

Charters Judicially Noticed.

§ 50. Courts will judicially notice the charter or incorporating act of a municipal corporation without being specially pleaded, not only when it is declared to be a *public statute*, but when it is *public or general in its nature or purposes*, though there be no express provision to that effect. But the acts, votes, and ordinances of the corporation are not public matters, and must be pleaded.[3]

Proof of Corporate Existence.— User.— Legislative Recognition.

§ 51. The primary evidence of a special charter or act of incorporation, in this country, is the original, or an authenticated copy, or a printed copy, published by authority. But if primary evidence cannot be had, parol or secondary evidence of its existence is admissible.[4] So where a public corporation had existed for a long space of time (in the instance before the court for forty years), the court admitted proof of its incorpo-

[1] *Ante*, p. 17, Sec. 8; p. 28, Sec. 9; p. 30, Sec. 10.

[2] *Ante*, p. 60, Sec. 21; p. 62, Sec. 22.

[3] Beatty *v.* Knowles, 4 Pet. (U. S.) 152, 157, 1830; Aldermen *v.* Finley, 5 Eng. (Ark.) 423, 1850; Fauntleroy *v.* Hannibal, 1 Dillon, C. C. 118, 1871; West *v.* Blake, 4 Blackf. (Ind.) 234, 1836; Briggs *v.* Whipple, 7 Vt. 15, 18, 1835; Case *v.* Mobile, 30 Ala. 538, 1857; Clarke *v.* Bank, 5 Eng. (Ark.) 516; State *v.* Mayor, 11 Humph. (Tenn.) 217, 1850; see Vance *v.* Bank, Blackf. (Ind.) 80, and note (2); 6 Bac. Abr. 374, note; Young *v.* Bank, &c. 4 Cranch, 384; Swails *v.* State, 4 Ind. 516, 1853; Portsmouth, &c. Co. *v.* Watson, 10 Mass. 91; Clapp *v.* Hartford, 35 Conn. 66; People *v.* Potter, 35 Cal. 110; see, *post*, chapter on Ordinances. Where a public law creates the mayor and aldermen an incorporated body, no averment or proof is necessary to establish the existence of the corporation. State *v.* Mayor, 11 Humph. (Tenn.) 217, 1850.

[4] Stockbridge *v.* West Stockbridge, 12 Mass. 400, 1815; Braintree *v.* Battles, 6 Vt. 395, 1834; Blackstone *v.* White, 41 Pa. St. 330.

ration *by reputation*, the original act not being found, and it being probable that it had been destroyed by fire.[1] So evidence that a town has for many years exercised corporate privileges, no charter, after search, being found, is competent to go to the jury to establish that it was duly incorporated. And where there is no direct or record evidence that a place has been incorporated, and it is sought to show the fact of incorporation from circumstantial evidence, the question is for the jury, and not the court; that is, the jury, under the circumstances, determine whether there is or is not sufficient ground to presume a charter or act of incorporation,[2] or the due establishment and existence of a corporate district under some general act.[3] So corporate existence may be inferred and judi-

[1] Dillingham *v.* Snow, 5 Mass. 547, 1809. S. P. Bassett *v.* Porter, 4 Cush. 487, 1849. In view of the defective manner in which the records of *quasi* corporations — such as school and road districts, and the like — are kept, the courts, in the absence of any statute requiring record evidence, will permit the existence and organization of the corporation to be proved by *reputation and acts*, where these facts do not appear of record. Barnes *v.* Barnes, 6 Vt. 388, 1834; Londonderry *v.* Andover, 28 *ib.* 416, 1856; Sherwin *v.* Bugbee, 16 *ib.* 439; Ryder *v.* Railroad Company, 13 Ill. 523; Highland Turnpike *v.* McKean, 10 Johns. 154; Owings *v.* Speed, 5 Wheat. 420. See chapter on Corporate Records and Documents, *post.*

Irregularities in the proceedings to organize a corporation are not favored when set up, long afterwards, to defeat the corporate existence. Jameson *v.* People, 16 Ill. 257, 1855; Dunning *v.* Railroad Company, 2 Ind. 437, 1850; Fitch *v.* Pinckard, 4 Scam. (Ill.) 76.

Where a corporation is created, and declared to exist as such, by the legislature, without condition, proof of *organization or user* is not necessary to enable them to maintain an action: Cahill *v.* Insurance Company, 2 Doug. (Mich.) 124; Fire Department *v.* Kip, 10 Wend. 266, 1833. And see Proprietors, &c. *v.* Horton, 6 Hill (N. Y.) 501; People *v.* President, 9 Wend. 351; Wood *v.* Bank, 9 Cowen, 194, 205. When construed to be *immediately* created, the omission to do certain acts prescribed to organize the institution, was held immaterial as respects persons contracting with the corporation. Brouwer *v.* Appleby, 1 Sandf. 158, 1847; S. P. People *v.* President, 9 Wend 351. See, also, *ante*, p. 63, Sec. 23.

[2] New Boston *v.* Dumbarton, 15 N. H. 201, 1844; Mayor of Kingston *v.* Horner, Cowp. 102, *per* Lord Mansfield.

[3] Bassett *v.* Porter, 4 Cush. 487, 1849; New Boston *v.* Dumbarton, 12 N. H. 409, 412, 1841. S. C. 15 N. H. 201; Robie *v.* Sedgwick, 35 Barb. 319, 1861. The exercise of corporate powers by a place for twenty years, without objection, and with the knowledge and assent of the legislature, furnishes conclusive evidence of a charter, which has been lost; or, in other words,

cially noticed, although the incorporating act or charter cannot be found, if the fact of incorporation is clearly recognized by subsequent legislation, not in contravention of any constitutional provision respecting the mode of creating corporations.[1]

Repeals and Amendments, and their Effect.

§ 52. The powers conferred upon municipal corporations may at any time be altered or repealed by the legislature, either by a *general law* operating upon the whole state, or, in the absence of constitutional restriction, by a *special act.*[2] A charter may be amended, and the name of the place and the governing body may be changed, and its boundaries altered, while in law the corporation remains the same. The insertion in an amended charter of the same provisions that were contained

of a corporation by prescription, which supposes a grant. Bow *v.* Allentown, 34 N. H. 351, 1857. In this case it was also held that an act of incorporation subsequently passed does not raise any *conclusive* presumption that the town was not before incorporated. *Long use and acquiescence* are evidence in support of the legal existence of a municipal corporation. People *v.* Farnham, 35 Ill. 562; Jameson *v.* People, 16 Ill. 257, 1855; People *v.* Maynard, 15 Mich. 463, 1867. Long acquiescence in the proceedings of a school district is presumptive evidence of the regular organization of such district. Sherwin *v.* Bugbee, 16 Vt. 439, 1844; Londonderry *v.* Andover, 28 *ib.* 416. "It is now well settled in this state, that the mere fact of a school district maintaining its existence and operation for a great number of years — say fifteen — is sufficient evidence of its regular organization. The same rule of presumption must be applied to the sub-division of the town into districts." *Per Redfield,* J., in Sherwin *v.* Bugbee, *supra.*

[1] Jameson *v.* People, 16 Ill. 257, 1855; Swain *v.* Comstock, 18 Wis. 463, 1864; People *v.* Farnham, 35 Ill. 562; Bow *v.* Allentown, 34 N. H. 351, 1857; Society, &c. *v.* Pawlet, 4 Pet. 480, 1830; Railroad Company *v.* Chenoa, 43 Ill. 209; Virginia City *v.* Mining Company, 2 Nev. 86, 1866; Railroad Company *v.* Plumas County, 37 Cal. 354. *Ante,* p. 60, Sec. 21.

[2] *Per Smith,* J., Sloan *v.* State, 8 Blackf. (Ind.) 361, 1847, approving; People *v.* Morris, 13 Wend. 325; Daniel *v.* Mayor, &c. 11 Humph. (Tenn.) 582; State *v.* Mayor, 24 Ala. 701, 1854; Girard *v.* Philadelphia, 7 Wall. 1, 1868. *Ante,* p. 65, Sec. 24; p. 70, Sec. 29, *et seq.* The provisions of an amendatory act, reducing the number of councilmen, though the act took effect at once, were postponed until the next year, when they could be called into requisition at the election — no earlier election being provided for — and meanwhile the existing council remained unaffected by the amendment. Scovill *v.* Cleveland, 1 Ohio St. 126, 1853.

in the old is not, unless such upon the whole act appears to have been the intention of the legislature, a repeal of the latter. The law on this subject is thus stated; "Where a statute does not, in express terms, annul a right or power given to a corporation by a former act, but only confers the same rights and powers under a new name, and with additional powers, such subsequent act does not annul the rights and powers given under the former act and under its former name," there being no express repeal.[1]

§ 53. A *repeating clause* in a revised and amendatory charter, when a former provision is included in the revised act, does not, as to such provision, interrupt the continuity of the original act.[2] Where the original charter of a city prescribed the qualifications required to make a person eligible to the office of mayor, and contained a proviso that a certain fact disqualified, and an amendatory act, in dealing with the same subject, copied all of the original act except the proviso, *which was omitted*, the court held that the proviso in the original act was not repealed, placing stress, however, upon the express declaration that all parts of the new act inconsistent with, or

[1] State, &c. *v.* Mobile, 24 Ala. 701, 1854; Girard *v.* Philadelphia, 7 Wall. 1, 1868; Commonwealth *v.* Worcester, 3 Pick. (Mass.) 474, 1826; Grant on Corp. 24, and cases cited; *ib.* 305. See chapter on Dissolution, *post.* "There is no doctrine better settled," says Mr. Justice *Strong*, "than that a change in the form of government of a community does not *ipso facto* abrogate pre-existing law, either written or unwritten. This is true in regard to what is strictly municipal law, even when the change is by conquest. The act of assembly converting the borough into a city did not, therefore, of itself, and in the absence of express provisions to that effect, either repeal the former acts of assembly relative to the borough, or annul existing ordinances. It was solely a change in the organic law for the future, and left unaffected the existing ordinances, precisely as a change of a state constitution leaves undisturbed all prior acts of assembly." Trustees of Academy *v.* Erie, 31 Pa. St. 515, 517, 1858. As to transfer to new or reorganized corporation of the property and rights of the old or former corporation, see Girard *v.* Philadelphia, 7 Wall. 1, 1868; Savannah *v.* Steamboat Company, R. M. Charlt. (Geo.) 342; Fowler *v.* Alexandria, 3 Pet. 398, 408; Municipality *v.* Commissioners, 1 Rob. (La.) 279. Transition from town to city organization does not dissolve the corporation or extinguish its indebtedness. Olney *v.* Harvey, 50 Ill. 453, 1869; Maysville *v.* Shultz, 3 Dana, 10, 1865; Frank *v.* San Francisco, 21 Cal. 668; *post*, Chapter VII.

[2] St. Louis *v.* Alexander, 23 Mo. 483, 1856.

contrary to, the old one, were repealed. There is, however, much room to contend that the subject matter having been revised in the amendatory act *in the manner it was*, the legislative intention was to repeal, and not to continue in force, the proviso.[1] A general law, forbidding the opening of streets through cemeteries, is not repealed by a subsequent act extending the limits of a town and appointing commissioners with authority "to survey, lay out, &c., streets and alleys, as they shall deem necessary, within said limits," since both acts can stand, and repeals by implication are not favored.[2] So a general statute expressly prohibiting a municipal corporation from debarring citizens from selling at wholesale in the city market is not repealed, by implication, by a subsequent act, by which the city authorities are invested with power to pass such ordinances as appear to them necessary for the security, welfare, &c. of the city.[3] So, also, where a state law required auctioneers to take out a state license, and a subsequent charter to a city gave it power "to provide for licensing, taxing, and regulating auctions," &c., it was held that a license granted by the city corporation to an auctioneer did not relieve him of the necessity of obtaining, also, a license from the state authorities, the court being of opinion that both statutes should and ought to stand, as they were not inconsistent.[4]

General Laws and Special Charters.—Conflict.—Construction.

§ 54. It is a principle of very extensive operation, that statutes of a general nature do not repeal, by implication, charters and special acts passed for the benefit of particular municipalities;[5] but they may do so when this appears to have been the

[1] State *v.* Merry, 3 Mo. 278, 1833. Consult Goodenow *v.* Buttrick, 7 Mass. 140, 143; King *v.* Grant, 1 Barn. & Adol. 104.

[2] Egypt Street, 2 Grant (Pa.), Cas. 455, 1854. See, further, *infra*, Sec. 54, as to repeals by implication.

[3] Haywood *v.* Savannah, 12 Geo. 404, 1853.

[4] Simpson *v.* Savage, 1 Mo. 359, 1823.

[5] Bond *v.* Hiestand, 20 La. An. 139; Railroad Company *v.* Alexandria, 17 Gratt. (Va.) 176, 1867; Hammond *v.* Haines, 25 Md. 541; Louisville *v.* McKean, 18 B. Mon. 9. *Repeals by implication* are not favored; and special laws conferring particular rights upon municipal corporations were held not

purpose of the legislature. If both the general and special acts can stand, they will be construed accordingly. If one *must* give way it will depend upon the supposed intention of the law-maker, to be collected from the entire course of legislation, whether the charter is superseded by the general statute, or whether the special charter provisions apply to the municipality, in exclusion of the general enactments. So particular provisions of charters should be read and construed in the light of the whole instrument, of all preceding charters, of the general legislation of the state, and of the object of the legislature in the erection of municipalities, as before explained.[1]

Extent of Power — Limitation — Canons of Construction.

§ 55. It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in *express words;* second, those *necessarily or fairly implied* in, or *incident*

to be repealed by subsequent statutes, general in their character. Ottawa *v.* County, 12 Ill. 339; Egypt Street, 2 Grant (Pa.), Cas. 455, 1854; *supra*, Sec. 53. A general statute, repealing all acts contrary to its provisions, held not to repeal a clause in the charter of a municipal corporation upon the same subject. State *v.* Branin (taxation), 3 Zabr. (N. J.) 484, 1852.

The principle that *general legislation* on a particular subject must, in the absence of anything showing a different intent on the part of the legislature, give way to *inconsistent special legislation* on the same subject, is recognized and applied in the following cases: State *v.* Morristown, 33 N. J. Law, 57, 1868; State *v.* Branin, 3 Zabr. 484; State *v.* Clark, 1 Dutch. 54; State *v.* Jersey City, 5 *ib.* 170; *in re* Goddard, 16 Pick. 504; Railroad Company *v.* Alexandria, *supra*. In Bank *v.* Bridges, 1 Vroom (N. J.) 112, and State *v.* Miller, *ib.* 368, special laws gave way to general laws, because the legislature had annexed to the latter a repealing clause, abrogating all inconsistent local or special acts. *Per Depue*, J., 33 N. J. 57, 60. See Bank *v.* Davis, 1 McCarter Ch. (N. J.) 286; Clintonville *v.* Keeting, 4 Denio, 341; Tierney *v.* Dodge, 10 Minn. 166. Other illustrations will be found in the chapters on Ordinances and Taxation, *post*.

[1] Alexandria *v.* Alexandria (taxing power), 5 Cranch, 2, 1809; Grant on Corp. 27; Canal Company *v.* Railroad Company, 4 Gill & Johns. 1; Smith *v.* Kernochen, 7 How. 198; Janesville *v.* Markoe, 18 Wis. 350; *ante*, pp. 17, 28, 30–41. Acts *in pari materia* should be construed together; and on this principle, the definition of the word "owner," in a subsequent paving act, was considered as proper to be adverted to, and as applicable to the same word in *prior* acts on the same subject. Holland *v.* Baltimore, 11 Md. 186, 1857.

to, the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation — not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation, nor its officers, can do any act, or make any contract, or incur any liability, not authorized thereby. All acts beyond the scope of the powers granted are void. Much less can any power be exercised, or any act done, which is forbidden by statute. These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations. Their reasonableness, their necessity, and their salutary character have been often vindicated, but never more forcibly than by the late learned Chief Justice *Shaw*, who, speaking of municipal and public corporations, says: "They can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association. This principle is derived from the nature of corporations, the mode in which they are organized, and in which their affairs must be conducted. In aggregate corporations, as a general rule, the act and will of a majority is deemed in law the act and will of the whole — as the act of the corporate body. The consequence is, that a minority must be bound not only without, but against, their consent. Such an obligation may extend to every onerous duty, to pay money to an unlimited amount, to perform services, to surrender lands, and the like. It is obvious, therefore, that if this liability were to extend to unlimited and indefinite objects, the citizen, by being a member of a corporation, might be deprived of his most valuable personal rights and liberties. The security against this danger is in a steady adherence to the principle stated; viz: that corporations can only exercise their powers over their respective members, for the accomplishment of limited and defined objects. And if this principle is important, as a general rule of social right and municipal law, it is of the highest importance in

these states, where corporations have been extended and multiplied so as to embrace almost every object of human concern."[1]

[1] *Per Shaw*, C. J., in Spaulding *v.* Lowell, 23 Pick. 71, 74, 1839; Bangs *v.* Snow, 1 Mass. 181; Stetson *v.* Kempton, 13 Mass. 272; Willard *v.* Newburyport, 12 Pick. 227; Keyes *v.* Westford, 17 Pick. 273, 279; Comw. *v.* Turner, 1 Cush. 493, 495, 1848; Cooley *v.* Granville, 10 Cush. 57, 1852; Merriam *v.* Moody, 25 Iowa, 163, 1868; Minturn *v.* Larue, 23 How. 435; Lafayette *v.* Cox, 5 Ind. (Port.) 38, 1854; Paine *v.* Spratley, 5 Kansas, 525; Vincent *v.* Nantucket, 12 Cush. 103, 105; Clark *v.* Davenport, 14 Iowa, 494; Mays *v.* Cincinnati, 1 Ohio St. 268; Gallia Co. *v.* Holcomb, 7 Ohio, part I. 232; Commrs. *v.* Mighels, 7 Ohio St. 109; Fitch *v.* Pinckard (taxing power), 4 Scam. (Ill.) 78; Caldwell *v.* Alton (market ordinance), 33 Ill. 416; Trustees, &c. *v.* McConnel, 12 Ill. 140; Louisiana State Bank *v.* Orleans Nav. Co. 3 La. An. 294; State *v.* Mayor, &c. (market house case) 5 Port. (Ala.) 279; Head *v.* Ins. Co. 2 Cranch, 168; De Russey *v.* Davis (sale of ferry lease), 13 La. An. 468; People *v.* Bank, &c. 1 Doug. (Mich.) 282; City Council *v.* Plank Road Co. 31 Ala. 76; State *v.* Mayor, 5 Port. (Ala.) 279; *Ex parte* Burnett, 30 Ala. 461, and cases cited; Le Couteleux *v.* Buffalo, 33 N. Y. 333; People *v.* Railroad Co. 12 Mich. 387.

"The powers of all corporations are limited by the grants in their charters, and cannot extend beyond them." *Per Breese*, J., Petersburg *v.* Metzger, 21 Ill. 205. "Corporations have only such rights and powers as are expressly granted to them, or as are necessary to carry into effect the rights and powers so granted." *Per Storrs*, J., in New London, *v.* Brainard (illegal appropriation of money to celebrate 4th of July), 22 Conn. 552, 1853, approving, Stetson *v.* Kempton, 13 Mass. 272; Hodge *v.* Buffalo, 2 Denio, 110, *ante*, p. 39, Sec. 13. "In this country, all corporations, whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given, or may not be reasonably inferred. But if we were to say that they can do nothing for which a warrant could not be found in the language of their charters, we should deny them, in some cases, the power of self-preservation, as well as many of the means necessary to effect the essential objects of their incorporation. And therefore, it has long been an established principle in the law of corporations, that they may exercise all the powers within the fair intent and purpose of their creation which are reasonably proper to give effect to powers expressly granted. In doing this, they must [unless restricted in this respect,] have a choice of means adapted to ends, and are not to be confined to any one mode of operation." *Per Church*, J., in Bridgeport *v.* Railroad Co. 15 Conn. 475, 501, 1843. The *incidental powers* of a municipal corporation must be germane to the purposes for which the corporation was created. Mayor *v.* Yuille, 3 Ala. 137 (license to bakers); Harris *v.* Intendant, 28 *ib.* 577 (retailing liquors); Intendant *v.* Chandler, 6 *ib.* 899 (retailing liquors).

Courts adopt a strict, rather than liberal, construction of powers: "It is a well settled rule of construction of grants by the legislature to corporations, whether *public* or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the

These general principles of law are indisputably settled, but difficulty is often experienced in their application, on account

legislature must be *resolved in favor of the public.* This principle has been so often applied in the construction of corporate powers, that we need not stop to refer to authorities." *Per Nelson*, J., in Minturn *v.* Larue, 23 How. (U. S.) 435, 436, 1859, construing municipal charter as to ferry rights of corporation thereunder. In subsequent cases, the Supreme Court has said that a municipal corporation "can exercise no power which is not, in *express terms*, or by *fair* implication, conferred upon it." Thompson *v.* Lee Co. 3 Wall. 320; Thomas *v.* Richmond, United States Supreme Court, December Term, 1871, not yet reported. S. P. Clark *v.* Davenport, 14 Iowa, 495; Merriam *v.* Moody's Executors, 25 Iowa, 163; Nichol *v.* Mayor, &c. 9 Humph. 252; Leonard *v.* Canton, 35 Miss. 189, where *Fisher*, J., gives a clear exposition of the *rationale* of the doctrine that corporate grants should be strictly construed. Douglas *v.* Placerville, 18 Cal. 643, 647; Argenti *v.* San Francisco, 16 Cal. 282; Wallace *v.* San Jose, 29 Cal. 180. With us, cities, towns, and municipal corporations of all kinds, are created and endowed with powers by the legislature. These are of a legislative and administrative character, to aid in the better government of localities or portions of the state. This power exists no further than it has been delegated. And municipal corporations, in their action, are confined "to a *strict* construction of the grants of powers contained in their charters" or acts of incorporation. Lafayette *v.* Cox, 5 Ind. (Porter) 38, 1854. "It is proper, too, that these powers should be strictly construed, considering with how little care chartered privileges are these days granted." Bank *v.* Chilicothe, 7 Ohio, part II. 31, 35, 1836, *per Hitchcock*, J.; Collins *v.* Hatch, 18 Ohio, 523. "Boroughs and towns are, confessedly, inferior corporations. They act not by any inherent right of legislation, like the legislature of the state, but their authority is delegated, and their powers, therefore, must be strictly pursued. *Within* the limits of their charter, their acts are valid; *without* it, they are void. Willard *v.* Killingworth, 8 Conn. 247, *per Daggett*, J.; approved 10 *ib.* 442. "The action of municipal corporations is to be held strictly within the limits prescribed by statute. Within these limits, they are to be favored by the courts. Powers expressly granted, or necessarily implied, are not to be defeated or impaired by a stringent construction." Smith *v.* Madison, 7 Ind. 86; Kyle *v.* Malin, 8 *ib.* 34, 37, *per Stuart*, J.

In concluding this note, the author thinks it pertinent to remark, that the principle of strict construction should not be pressed in any case to such an unreasonable extent as to defeat the legislative purpose fairly appearing upon the entire charter or enactment. Perhaps the rule as it is briefly expressed in the text, best embodies the result of the adjudications upon this point, namely: If, upon the whole, there be fair, reasonable, and substantial doubt whether the legislature intended to confer the authority in question, particularly, if it relates to a matter extra-municipal or unusual in its nature, and the exercise of which will be attended with taxes, tolls, assessments, or burdens upon the inhabitants, or oppress them, or abridge natural or common rights, the doubt should be resolved in favor of the citizen, and against the municipality. *Infra*, Sec. 73.

of the complex character of municipal duties, and the various, miscellaneous, and frequently indefinite, purposes or objects which municipalities are authorized to execute or carry into operation.[1]

Usage as Affecting Municipal Powers.

§ 56. In England municipal corporations claim and exercise many powers wholly in virtue of long-established *usage*, or of *prescription*, which implies a lost charter conferring such powers.[2] Indeed, from immemorial usage, powers are recognized as valid, which could not lawfully originate in a royal charter. A usage to give a right must, however, be long established, and forty years' duration was not considered, of itself, to be sufficient for this purpose.[3] But usage in this country has a much more limited operation. It seems to be a necessary result of the manner in which our municipal corporations are created, viz., by express legislative act, wherein their powers and duties are wholly prescribed, that the powers themselves cannot be added to, enlarged, or diminished, by proof of usage.

§ 57. In a case in Massachusetts, the learned chief justice *Bigelow*, after stating the decision of the Supreme Court, that towns in Massachusetts had no authority to appropriate money for the celebration of the Fourth of July, remarks, in relation to the attempt to sustain the appropriation on the ground of *usage*: "Usage cannot alter the case. An unlawful expenditure of money by a town cannot be rendered valid by usage, however long continued. Abuses of power and violations of right derive no sanction from time or custom. A casual or occasional exercise of a power by one or a few towns will not constitute a usage. It must not only be general, and of long continuance, but, what is more important, it

[1] Spalding *v.* Lowell, 23 Pick. 71; *ante*, pp. 22, 28–30; *post*, Chap. VI. where some of these miscellaneous or special powers are considered.

[2] *Ante*, Chap. II. p. 39; Chap. III. p. 44.

[3] Chad *v.* Tilsed, 5 J. B. Moore, 185. As to the proper office of usage in England, both as a source of power and to aid in the interpretation of charter, see Grant on Corp. 19, 27, 28, 29, 552, 564.

must also be a custom necessary to the exercise of some corporate power, or the enjoyment of some corporate right, or which contributes essentially to the necessities and convenience of the inhabitants. The usage relied on in the present case would not satisfy either of these last named requisites, which are necessary to give it validity."[1] But general and long-continued usage is not without its importance, and usage of this character may be resorted to in aid of a proper construction of the charter or statute, but no further. If the language be uncertain or doubtful, a uniform, long-established, and unquestioned usage will be regarded by the courts in determining the mode in which powers may be exercised, and to a reasonable extent in determining the scope of the powers themselves; but usage can have no room for operation where the language of the enactment is plain and the legislative intent is clear upon the face of it.[2]

Discretionary Powers not Subject to Judicial Control.

§ 58. Power to do an act is often conferred upon municipal corporations, in general terms, without being accompanied by

[1] Hood *v.* Lynn, 1 Allen (Mass.), 103, 1861. Further as to usage, consult Willard *v.* Newburyport, 12 Pick. 227; Spaulding *v.* Lowell, 23 Pick. 71; Smith *v.* Cheshire, 13 Gray (Mass.), 308, 1859; Butler *v.* Charlestown, 7 Gray, 12, 16, 1856; Benoit *v.* Conway, 10 Allen, 528.

[2] Smith *v.* Cheshire, 13 Gray, 308; Butler *v.* Charlestown, 7 Gray, 12, 16; Sherwin *v.* Bugbee (validity of school meeting), 16 Vt. 439, 444, where *Redfield*, J., remarks: "In construing statutes applicable to public corporations, courts will attach no slight weight to the uniform practice under them, if this practice has continued for a considerable period of time." It is a rule "founded on reason and common sense," says the Court of Appeals of Maryland, that "doubtful words in a general statute may be expounded with reference to a general usage; and when a statute is applicable to a particular place only, such words may be construed by usage at that place." Frazier *v.* Warfield (Inspection Act for Baltimore), 13 Md. 279, 303; S. P. Love *v.* Hinckley, Abt. Adm. 436; see, also, Rex *v.* Chester, 1 Maule & Selw. 101; Rex *v.* Salway, 9 B. & C. 424. Where the true construction of a charter admits of doubt, and the construction adopted by the city authorities has been acquiesced in generally, and acted upon by third persons in good faith, in their transactions with the city, it will be precluded by the courts in actions by such third parties from denying its construction to be the true one. Van Hostrup *v.* Madison City (on railroad bonds), 1 Wall. (U. S.) 291, 1863; Meyer *v.* Muscatine (on railroad bonds), *ib.* 384, 391. Further as to estoppel, see chapter on Contracts, *post*.

any prescribed mode of exercising it. In such cases the common council, or governing body, necessarily have, to a greater or less extent, a discretion as to the manner in which the power shall be used.[1] So where the law or charter confers upon the city council, or local legislature, power to determine upon the expediency or necessity of measures relating to the local government, their judgment upon matters thus committed to them, while acting within the scope of their authority, cannot be controlled by the courts. In such case, the decision of the proper corporate officers is final and conclusive, unless they transcend their powers.[2] Thus, for example, if a city has power to grade streets, the courts will not inquire into the necessity of the exercise of it, or the refusal to exercise it, nor whether a particular grade adopted, or a particular mode of executing the grade, is judicious.[3] So if a city has power to build a market-house, the courts cannot inquire into the size and fitness of the building for the object intended.[4]

§ 59. So, also, where, by its charter, a municipal corporation is empowered, if it deems the public welfare or conveni-

[1] Railroad Co. *v.* Evansville (power to subscribe stock and to borrow money), 15 Ind. 395, 1860; Kelly *v.* Milwaukee, 18 Wis. 83; Slack *v.* Railroad Co. 13 B. Mon. 1; Bridgeport *v.* Railroad Co. 15 Conn. 475, 501, 1843, *per Church*, J.; Harrison *v.* Baltimore, 1 Gill (Md.), 264, 1843; Cincinnati *v.* Gwynne, 10 Ohio, 192; Markle *v.* Akron, 14 Ohio, 586. Where a municipal corporation is entrusted with the execution of a power, and is not confined to a particular mode, but has a discretion in the choice of means, a plain case of abuse must be shown resulting in an injury to the petitioner, to warrant an injunction against the corporation. Page *v.* St. Louis (special assessment), 20 Mo. 136, 1853; Colton *v.* Hanchett, 13 Ill. 615; Mayor of Baltimore *v.* Gill, 31 Md. 375; Holland *v.* Baltimore, 11 Md. 186; Dodd *v.* Hartford, 25 Conn. 232; Sheldon *v.* School District, *ib.* 224; Lockwood *v.* St. Louis, 24 Mo. 20; Dean *v.* Todd, 22 Mo. 91; Mayor, &c. *v.* Meserole, 26 Wend. 132. See chapters on Contracts and Taxation, *post.* In respect to the legislative functions of a municipal body, the courts are bound to presume that they will exercise any discretion with which they are clothed properly, and that they had sufficient reasons for doing an act, the result of such discretion. Railroad Co. *v.* Mayor of New York, 1 Hilton, 562, 1858.

[2] Baker *v.* Boston, 12 Pick. 184; Hovey *v.* Mayo, 43 Maine, 322, 1857; Fay, petitioner, 15 Pick. 243, 1834; Parks *v.* Boston, 8 Pick. 218, 1829.

[3] Hovey *v.* Mayo, street commissioner, 43 Maine, 322, 1857; Benjamin *v.* Wheeler, 8 Gray, 409, 413, 1857.

[4] Spalding *v.* Lowell, 23 Pick. 71, 80, 1839.

ence requires it, to open streets or make public improvements thereon, its determination, whether wise or unwise, cannot be judicially revised or corrected.[1] On the ground that it is the province of the municipal authorities, and not of the judicial tribunals, to determine what improvements shall be made in the streets and highways of the corporation, the court, on application of citizens, refused to compel a city to cover over an open draining canal of long standing, it "not appearing to be a nuisance in the legal sense of the word."[2] So where it is made the duty of a city to remove, as far as they may be able, every nuisance which may endanger health, the courts cannot control the manner in which this shall be done.[3] And generally, the judicial tribunals will not interfere with municipal corporations in their internal police and administrative government, unless some clear right has been withheld or wrong perpetrated.[4]

Public Powers and Trusts Incapable of Delegation.

§ 60. The principle is a plain one, that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others. Thus, where by charter or statute, local improvements, to be assessed upon the adjacent property owners, are to be constructed in "such *manner* as the *common council* shall prescribe" by ordinance, it is not competent for the council to pass an ordinance delegating or leaving to any officer or committee of the corporation the power to determine the mode, manner, or plan of the improvement. Such an ordinance is void, since powers of this kind must be exercised in strict conformity

[1] Methodist P. Church *v.* Baltimore, 6 Gill (Md.), 391, 1848. Passing ordinances in relation to opening, &c., of streets, is the exercise of legislative, not judicial, power. Wiggin *v.* Mayor, &c. of New York, 9 Paige, 16, 1841. See chapter on Eminent Domain, *post.*

[2] Inhabitants *v.* New Orleans, 14 La. An. 452, 1859.

[3] Baker *v.* Boston, 12 Pick. 184, 1831; see, also, Kelly *v.* Milwaukee, 18 Wis. 83, 1864; Goodrich *v.* Chicago, 20 Ill. 445. Further as to nuisances, see chapter on Ordinances, *post.*

[4] State *v.* Swearingen, 12 Geo. 23.

with the charter or incorporating act.[1] So, where a power, for example, the power to issue licenses, is granted by law, or by an ordinance duly passed, to the mayor *and aldermen*, they are constituted to act as one deliberative body, to the end that they may assist each other by their united wisdom and experience, and the result of their conference be the ground of their determination; and where this is the case, the board of aldermen cannot, even by a vote, delegate the power to the mayor alone.[2] But the principle that municipal powers or discretion cannot be delegated, does not prevent a corporation from appointing agents and empowering them to make contracts, nor from appointing committees and investing them with duties of a ministerial or administrative character.[3]

[1] Thompson *v.* Schermerhorn, 6 N. Y. (2 Seld.) 92, 1851, relating to grading and leveling streets; affirming S. C. 9 Barb. 152, and approving, in the main, the views there expressed by Mr. Justice *Cady*. Same principle applied in similar case, Ruggles *v.* Collier, 43 Mo. 359, 1869, holding that where the charter gave the city power to require streets to be paved, "in all cases where the *city council* shall deem it necessary," it could not, by ordinance, make the mayor the judge of the necessity for paving. Reaffirmed but distinguished, Sheehan *v.* Gleeson, 46 Mo. 100, 1870; East St. Louis *v.* Wehrung, 50 Ill. 28, 1869. So, where the charter gives the city council power to construct sewers of such "dimensions as may be prescribed by ordinance," the council cannot, by ordinance, require sewers to be constructed of such dimensions as may be deemed requisite by the city engineer. St. Louis *v.* Clemens, 43 Mo. 395, 1869, overruling St. Louis *v.* Eters, 36 Mo. 456. See, further, State *v.* New Brunswick, 1 Vroom (N. J.), 395, 1863; Meuser *v.* Bisdon, 36 Cal. 239; Hydes *v.* Joyes, 4 Bush (Ky.), 464; *post*, chapter on Taxation. So, where a charter directed the *common council* to appoint a time when persons interested in an application for opening a street would be heard, the council must itself fix the time, and cannot delegate that duty to the clerk. If it does so, its proceedings will be set aside on *certiorari* or other direct procedure. State *v.* Jersey City, 1 Dutch. (N. J.) 309, 1855; State *v.* Jersey City, 2 *ib.* 444, 447. A municipal corporation cannot delegate powers conferred upon and to be exercised by *it* to a street committee or others. White *v.* Mayor (sidewalk assessment), 2 Swan (Tenn.), 364, 1852. See Smith *v.* Morse, 2 Cal. 524; Oakland *v.* Carpentier, 13 Cal. 540; Whyte *v.* Nashville, 2 Swan (Tenn.), 364.

[2] Day *v.* Green, 4 Cush. 433, 1849, and cases there cited. Further, as to delegation of power, Coffin *v.* Nantucket, 5 Cush. 269, 1850; Ruggles *v.* Nantucket, 11 Cush. 433; Clark *v.* Washington, 12 Wheat. 40, 54, 1827; Cooley, Const. Lim. 204; Railway Co. *v.* Baltimore, 21 Md. 93, 1863.

[3] Railroad Co. *v.* Marion Co. 36 Mo. 294; Schenley *v.* Commonwealth, 36 Pa. St. 62. See chapters on Contracts and Corporate Meetings, *post*.

Legislative Powers Incapable of Surrender.

§ 61. Powers are conferred upon municipal corporations for public purposes, and as their legislative powers cannot, as we have just seen, be delegated, so they cannot be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party, to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties.[1] The cases cited illustrate this salutary principle in a great variety of circumstances, and, for the protection of the citizen, it is of the first importance that it shall be maintained by the courts in its full scope and vigor.

Mandatory and Discretionary Powers.

§ 62. It often becomes a question whether a duty, imposed by law or charter upon municipal corporations or public officers, is imperative or discretionary. This is a question of leg-

[1] Milhau *v.* Sharp, 27 N. Y. 611, 1863; Presb. Church *v.* Mayor, &c. of N. Y. 5 Cow. 538, 1826; followed, Stuveysant *v.* Mayor, &c. of N. Y. 7 Cow. 588; Sav. Fund *v.* Philadelphia, 31 Pa. St. 175; *Ex parte* Mayor, &c. of Albany, 23 Wend. 277; Railroad Co. *v.* Mayor, &c. 1 Hilt. 562, 568; Martin *v.* Mayor, &c. 1 Hill (N. Y.), 545, 1841; Goszler *v.* Georgetown, 6 Wheat. 593; Sedgw. Const. and St. Law, 634; State *v.* Graves, 19 Md. 351, 373, 1862; Bryson *v.* Philadelphia, 47 Pa. St. 329; Cooley, Const. Lim. 206; Albany St. 6 Abb. Pr. R. 273; Britton *v.* Mayor, &c. of N. Y. 21 How. Pr. R. 251; New York *v.* Second Av. &c. Co. 32 N. Y. 261; Dingman *v.* People, 51 Ill. 277; Brimmer *v.* Boston, 102 Mass. 19, 1869; Johnson *v.* Philadelphia, 60 Pa. St. 445; State *v.* Cin. Gas. Co. 18 Ohio St. 262, 295; Jackson *v.* Bowman, 39 Miss. 671, 1861; Oakland *v.* Carpentier, 13 Cal. 540, 1859, opinion of *Baldwin*, J.; Smith *v.* Morse, 2 Cal. 524. Compare Attorney General *v.* Mayor, &c. of N. Y. 3 Duer, 119, 131, 147; Davis *v.* Same, 14 N. Y. (4 Kern.) 506, 532; Costar *v.* Brush, 25 Wend. 628. One legislature, in the enactment of laws, cannot, by contract, put it out of the power of a subsequent legislature to repeal or amend them; cannot thus surrender a portion of its sovereign power. Dibolt *v.* Ins. and Trust Co. 1 Ohio St. 564; Plank R. Co. *v.* Husted, 3 *ib.* 578, *per Bartley*, C. J., dissenting; Matheny *v.* Golden, 5 Ohio St. 375; Mott *v.* Pa. Railroad Co. 30 Pa. St. 9, 1858. But see, in Supreme Court of the United States, Home *v.* Rouse, 8 Wall. 430, and prior cases cited, and the vigorous dissent, *ib.* 441, which seems, were the question open, to be the sound view. Cooley, Const. Lim. 127, 280; Sedg. Const. and St. Law, 616, 633.

islative intention. The words that a corporation, or officer, "may" act in a certain way, or that it "shall be lawful" to act in a certain way, may be imperative. On this subject the cases sustain the doctrine, that what public corporations or officers are empowered to do for others, and which is beneficial to them to have done, the law holds they ought to do. The power is conferred for the benefit of others; and the *intent* of the legislature, which is the test in such cases, ordinarily seems, under such circumstances, to be, to impose a positive and absolute duty. But, under other circumstances, where the act to be done does not affect third persons, and is not clearly beneficial to them or the public, and the means for its performance are not supplied, the words, "may" do an act, or it is "lawful" to do it, do not mean "must," but rather indicate an intent in the legislature to confer a discretionary power.[1] Each case must be largely decided on its own circumstances.

[1] Mason *v.* Fearson (duty of city under tax law), 9 How. (U. S.) 248, 259, *per Woodbury*, J., and authorities there cited. It is the settled docrine in New York, that where a public or municipal corporation or body is invested with power to do an act which the public interests require to be done, and have the means for its complete performance placed at its disposal, not only the execution, but the proper execution of the power, may be insisted on as a duty, though the statute conferring it be only permissive in its terms. Mayor, &c. of New York *v.* Furze, 3 Hill, 612, holding corporation liable for omitting its duty to *repair* sewers, although it would not have been liable for omitting to have constructed them originally. Approved, 16 N. Y. 162, *note, per Selden*, J.; *per Denio*, J., 9 N. Y. 168, 458; *per Allen*, J., *ib.* 461. See, however, the chapter on Actions, *post.*

When words are *imperative, and when directory*, see, further: Grant Corp. 34, 35; Rex *v.* Mayor, &c. of Hastings, 5 Barn. & Ald. 592, note; Attorney General *v.* Lock, 3 Atk. 164; Rex *v.* Mayor, &c. of Chester, 1 Maule & Sel. 101; Rex *v.* Bailiffs, &c. 1 Barn. & Cress. 86; 3 *ib.* 272; Railroad Co. *v.* Platte Co. 42 Mo. 171; Railroad Co. *v.* Buchanan Co. 39 Mo. 485; Goodrich *v.* Chicago, 20 Ill. 445, authority to city "to remove all obstructions in the harbor," held not imperative, *ib.* Ottawa *v.* People, 48 Ill. 233; Carr *v.* North Liberties, 35 Pa. St. 324; Joliet *v.* Verley, 35 Ill. 58; Wilson *v.* Mayor, &c. 1 Denio, 595. An act that "the city council are hereby authorized to elect a recorder, in whom they may vest exclusive jurisdiction of all violations of their ordinances," imposes the duty to elect this officer. The language is injunctive, and not discretionary. Vason *v.* Augusta, 38 Geo. 542, 1868. The expression, in a supplemental charter, "*it shall be lawful*," construed not to enjoin an imperative duty on the corporation. Seiple *v.* Elizabeth, 3 Dutch. (N. J.) 407.

§ 63. It is, also, sometimes difficult to determine whether specific duties prescribed by the charter or incorporating act rest upon the *corporation, or upon the aldermen or other officers* named, in their individual capacity. The question is one of construction. The general rule is this: that where powers pertaining to the duties of a corporation are conferred upon those who officially represent the corporation, these powers, unless the contrary appear, are deemed to be conferred upon them in their corporate, not their individual, character — in other words, upon the corporation itself.[1]

Exemption of Revenues from Judicial Seizure.

§ 64. Municipal corporations are instituted by the supreme authority of a state for the public good. They exercise, by delegation from the legislature, a portion of the sovereign power. The main object of their creation is to act as administrative agencies for the state, and to provide for the police and local government of designated civil divisions of its territory.[2] To this end they are invested with governmental powers and charged with civil, political, and municipal duties. To enable them beneficially to exercise these powers and discharge these duties, they are clothed with the authority to raise revenues by taxation and in other modes, as by fines and penalties. The revenue of the public corporation is the essential means by which it is enabled to perform its appointed work. Deprived of its regular and adequate supply of revenue, such a corporation is practically destroyed, and the very ends of its erection thwarted. Based upon considerations of this character, it is the settled doctrine of the law that the taxes and public revenues of such corporations cannot be seized under execution against them. Such taxes and revenues cannot be seized either in the treasury or when in transit to it. Judgments rendered for taxes, and the proceeds of such judgments in the hands of officers of the law, are not subject to execution unless so declared by statute. The doctrine of the in-

[1] Conrad *v.* Ithaca, 16 N. Y. 158, *per Selden*, J., p. 170; Hickok *v.* Plattsburg, 15 Barb. S. C. 427; Glidden *v.* Unity, 10 Fost. (N. H.) 104, 119.

[2] *Ante*, p. 17, *et seq*; p. 28, Sec. 9.

violability of the public revenues by the creditor is maintained, although the corporation is in debt, and has no means of payment but the taxes which it is authorized to collect.[1]

§ 65. Upon similar considerations of public policy and convenience, municipal corporations and their officers have usually, though not uniformly, been considered *not to be subject to garnishment*, although private corporations, equally with natural persons, are liable to this process. The cases on the subject, as respects municipal corporations, are referred to in the note, and it will be seen, on examination, that some of them turn on the construction of particular statutes, and that the judges differ in opinion respecting the policy and expediency of subjecting, upon general principles, such corporations to the process of garnishment. The author suggests, where the question is left entirely open by statute, that, on principle, a municipal corporation should be exempt from liability of this character with respect to its revenues and the salaries of its officers, but that where it owes an ordinary debt to a third

[1] Edgerton *v.* Municipality, 1 La. An. 435, 1846, where the subject is ably discussed in the opinion of *Rost*, J. He says: "On the first view of this question there is something very repugnant to the moral sense in the idea that a municipal corporation should contract debts, and that, having no resources but the taxes which are due to it, these should not be subjected, by legal process, to the satisfaction of its creditors. This consideration, deduced from the principles of moral duty, has only given way to the more enlarged contemplation of the great and paramount interests of public order and the principles of government." *Ib.* 440. S. P. Municipality *v.* Hart, 6 La. An. 570, 1851. This case holds that a judgment in favor of the corporation for a fine incurred for a violation of a municipal ordinance is exempt from execution; but that an *ordinary debt* due the corporation (as on a bond taken for paving) is liable to be seized. But *quære?* In Edgerton *v.* Municipality, *supra*, it was decided that the public taxes and revennes of the corporation could not be seized under execution, notwithstanding the general provision of the Code of Practice of Louisiana, authorizing the seizure, under execution, of "all sums of money which may be due to the debtor in whatsoever right,"—this general language being construed to refer alone to *rights of property*, and not to taxes imposed for the protection of those rights. So in the Railroad Co. *v.* Municipality, 7 La. An. 148, 1852, it was held that perpetual ground rents, created and intended by the legislature to form part of the permanent revenue of the city to enable it to exercise its municipal powers of police and local government, cannot be sold on execution against the corporation. See chapter on Taxation, *post.*

person, the mere inconvenience of having to answer as garnishee furnishes no sufficient reason for withdrawing it from the reach of the remedies which the law gives to creditors of natural persons and private corporations.[1]

[1] The Supreme Court of Pennsylvania is of the opinion that, on principle, a municipal corporation or its officers are not subject to garnishment on attachment or execution, and that, by the statutes of that state, they are not made liable thereto. Erie *v.* Knapp, 29 Pa. St. 173, 1857; Bulkley *v.* Eckert, 3 Barr (Pa.), 368, *per Sergeant*, J.; S. P. McDougal *v.* Supervisors, 4 Minn. 184; Bradley *v.* Richmond, 6 Vt. 121; Burnham *v.* Fond du Lac, 15 Wis. 193, 1862, where the inconvenience of the opposite doctrine is forcibly pointed out by *Paine*, J.; Drake on Attach. Sec. 516, 10; Hadley *v.* Peabody, 13 Gray, 200.

In *Missouri*, also, it is held, upon general principles, that municipal corporations are not subject to garnishment on account of salary due to their officers. Hawthorn *v.* St. Louis, 11 Mo. 59, 1847; S. P. Fortune *v.* St. Louis, 23 Mo. 239, 1856, where the decision is placed upon the broad ground that such corporations are not liable to be garnished, and not on the ground that an officer's salary is exempt from such process. See, also, Neuer *v.* Fallon, 18 Mo. 277. In *Connecticut*, public officers having money in their hands, to which an individual is entitled, are not subject to garnishment at the suit of the creditors of such individual. Stillman *v.* Isham, 11 Conn. 123, 1835, and cases cited; Ward *v.* County of Hartford, 12 *ib.* 404, 408. And in that state, a county not having power to contract a debt for which an action will lie against it, is not subject to garnishment in such a case. Ward *v.* County of Hartford, 12 Conn. 404. But under a statute enabling towns and cities to contract debts, and which provides that debts due from "any person" to a debtor may be attached, these corporations may be factorised or garnished. Bray *v.* Wallingford, 20 Conn. 416, 1850.

In Smoot *v.* Hart, 33 Ala. 69, 1858, it is held that the marshal of a city may be garnished for city funds in his hands: whether the treasurer could be garnished not decided. Mayor *v.* Rowland, 26 Ala. 498, holds that a municipal corporation cannot be garnished as respects accruing salaries to its officers. See, also, Clark *v.* School Com. 36 Ala. 621. In *Massachusetts*, a county is not chargable as a garnishee for jurors' fees. Williams *v.* Boardman, 9 Allen, 570. In *Maryland*, notwithstanding a general statute of the state authorized the garnishment of any "person or persons whatever, *corporate* or sole," it was held that municipalities were not included, and that, upon general grounds of public policy and convenience, the city could not be garnished in respect of money due from the salaries of its officers, although the officer whose salary was attached could have sued the city therefor. Baltimore *v.* Root, 8 Md. 95, 1855. The city, in this case, was garnished in respect of money due from it to a *police officer*.

But in *New Hampshire*, under a statute making "any *corporation* possessed of any money" of the debtor subject to garnishment, a town was held to be included. Whidden *v.* Drake, 5 N. H. 13. See Brown *v.* Heath, 45 N. H. 185. In *Iowa*, it was held that the words "debtor or person holding

property," in the attachment act, extended to municipal corporations, and that they were subject to garnishment with respect to ordinary debts which they owed the main debtor. Wales *v.* Muscatine, 4 Iowa, 302, 1856. The decision of the court asserts the liability to garnishment on general principles; but subsequently the legislature enacted that "a municipal or political corporation should not be garnished." Rev. 1860, Sec. 3196. Requisites of notice to corporation, Claflin *v.* Iowa City, 12 Iowa, 284; Williams *v.* Kenney, 98 Mass. 142. In *Ohio*, under a statute which provides that "any claims or choses in action, due or to become due" to the judgment debtor, or "money which he may have in the hands of any person, body politic or corporate," are subject to execution, salaries of officers of incorporated cities, due and unpaid, may be subjected by the judgment creditors of such officers to the payment of their judgments, and municipal corporations may be garnished with respect to such salaries. The court admits the conflict in the decisions of other states upon similar statutes, but regards the construction above given as being in accordance with public policy and the meaning of the statute. Newark *v.* Funk, 15 Ohio St. 462, 1864. In *Illinois*, municipal corporations are not subject to garnishment in any case, no matter what may be the character of the indebtedness. This position is maintained by *Lawrence*, J., with great force. Merwin *v.* Chicago, 45 Ill. 133, 1867.

CHAPTER VI.

MUNICIPAL CHARTERS.— CONTINUED.

Special Powers and Special Limitations.

§ 66. While municipal corporations are instituted for the same general purposes, heretofore explained,[1] and while there is a striking resemblance in the authority with which they are clothed, yet, except when organized under general acts, the powers given to them are various, both in character and extent.[2] True policy, indeed, requires, as before suggested, that the powers of these bodies should, in general, be confined to subjects connected with civil government and local administration, but legislatures are usually liberal in grants of this character, and there is no limit to the faculties and capacities with which municipal creations may be endowed, unless that limit is contained in the state constitution.[3] The leading powers ordinarily exercised by municipalities, such as those relating to contracts, eminent domain, streets, taxation, ordinances, corporate officers, actions, and the like, will be, hereafter, separately treated. But it will be convenient to notice, in this place, some special powers usually or often conferred upon municipalities, and some special limitations upon ordinary municipal powers, and the construction which such provisions have judicially received. We shall here notice the following subjects as they relate to municipal corporations: 1. Wharves. 2. Ferries. 3. Borrowing Money. 4. Limitations on the Power to Create Debts. 5. Rewards for Offenders. 6. Public Buildings. 7. Police Powers and Regulations. 8. Prevention of Fires. 9. Quarantine and Health. 10. Indemnifying Officers. 11. Furnishing Entertainments. 12. Impounding Animals. 13. Party Walls. 14. Public Defence. 15. Aid to Railway Companies.

[1] *Ante*, pp. 17, 28–32; *supra*, Secs. 63, 64,

[2] *Ante*, pp. 56–59.

[3] Aurora *v.* West, 9 Ind. 74, 1857; *ante*, Chap. IV.

Wharves.

§ 67. Among the powers of a special and extra-municipal nature frequently conferred by the legislature upon municipal corporations bordering upon the high seas or navigable waters, is the authority to erect wharves, and charge wharfage as a compensation for keeping the same and their approaches in a proper and safe condition for the landing, loading, and unloading of vessels.[1] The authority of the State over navigable waters, and the shores, is, of course, subject to the constitution of the United States, and the laws made in pursuance thereof regulating commerce, and the admiralty jurisdiction of the federal courts.[2] But although the power to erect wharves and charge wharfage is not strictly one relating to municipalities, it is, nevertheless, competent for the legislature to make them, in such measure as it deems expedient, the repository of it.[3]

[1] Commonwealth *v.* Alger, 7 Cush. 53, 82, 1851; Pollard's Lessee *v.* Hagan, 3 How. (U. S.) 212; Municipality *v.* Pease. 2 La. An. 538, 1847; Worsley *v.* Municipality, 9 Rob. (La.) 324; New Orleans *v.* United States, 10 Pet. 662, 737. The Wharf Case, 3 Bland Ch. (Md.) 383.

[2] State and authorized municipal *pilot and harbor regulations*, when not in conflict with the federal constitution or federal legislation, are valid. Steamship Co. *v.* Joliffe, 2 Wall. 450; Cooley *v.* Board of Wardens, 12 How. (U. S.) 299; Pollard's Lessee *v.* Hagan, 3 *ib.* 212; Cisco *v.* Roberts, 36 N. Y. 292; Port Wardens *v.* Ship, &c. 14 La. An. 289, 1859; Same *v.* Pratt, 10 Rob. (La.) 459; Chapman *v.* Miller (pilotage fee), 2 Speers (South Car.), Law, 769; Alexander *v.* Railroad Co. (duty on *tonnage*), 3 Strob. (South Car.) Law, 594, 1847; State *v.* City Council, 4 Rich. (South Car.) Law, 286; Commonwealth *v.* Alger, 7 Cush. 53, 82, 1850; Worsley *v.* Municipality, above cited. But state enactments, which amount to a regulation of commerce or impose a duty on tonnage are, of course, void. Steamship Co. *v.* Port Wardens, 6 Wall. 31, 1867. See, also, United States *v.* Duluth, 1 Dillon, C. C. 469.

[3] Fuller *v.* Edings, 11 Rich. (South Car.) Law, 239, 1858; Waddington *v.* St. Louis, 14 Mo. 190, 1851; Baltimore *v.* White, 2 Gill (Md.), 444, 1845; Wilson *v.* Inloes, 11 Gill & J. (Md.) 351. The owner of a private wharf, whose land is compulsorily taken for a public wharf, is not necessarily entitled to be compensated for *loss of income* from his private wharf, resulting in the establishment of the public wharf near to the private one. Fuller *v.* Edings, *supra*. The grant of an exclusive right to keep a wharf, in order to secure its erection, does not violate the provision of a state constitution, declaring "that no man or set of men are entitled to exclusive, separate, public emoluments or privileges from the community, but in consideration of public services." Such an improvement is beneficial to the public, and, in order to secure it, the exclusive profits for a given period may be granted to the contractor. Martin *v.* O'Brien, 34 Miss. (5 George) 21, 1857; see, also, Geiger *v.* Filor, 8 Flor. 325, 1859.

It may authorize a municipal corporation to establish a public wharf upon private property on making compensation to the owner of the land; and the power, when conferred upon the municipality, cannot be arrested by an offer on the part of the land-owner himself to erect a wharf.[1]

§ 68. Wharves, piers, quays, and landing-places, may be either *public or private.* They may be, in their nature, public, although the property be owned by an individual. If *private*, the public have no right to use the erection without the owner's consent, express or implied; if public, they may be used by persons generally upon the payment of a reasonable compensation. Whether they are public or private depends, in case of dispute, upon circumstances, such as the purpose for which they were built, the uses to which they have been applied, the place where located, and the character of the structure.[2]

§ 69. The keeping of a wharf or dock, erected and opened to the public, like the keeping of an inn, confers a *general license* to boats and vessels to occupy it for lawful purposes — a license which can only be terminated by notice and request to remove the vessel.[3] When thus established, the owner at common law is, as respects the public, bound to keep it in *good repair.* In view of these obligations on the part of the owner of the wharf, the common law gave him the right to distrain for his wharfage or toll.[4]

[1] Waddington *v.* St. Louis, above cited.

[2] Dutton *v.* Strong, 1 Black (U. S.), 23, 1861. The owner of a *private* pier may, it was held in this case, cut loose a vessel attached to it without a license if the pier be thereby endangered, no matter how great the stress of the weather or the peril to which the vessel may be thereby subjected.

[3] Heeney *v.* Heeney, 2 Denio, 625; Nicoll *v.* Gardner, 13 Wend. 289, 1835; Lansing *v.* Smith, 4 Wend. 9; Dutton *v.* Strong, 1 Black, 23, distinguithed from Heeney *v.* Heeney, *supra.*

[4] Hale de Port. Maris, 77; Bradley on Distress, 133; Nicoll *v.* Gardner, 13 Wend. 289. The right of distress is regulated by statute in the city of New York, and it was here held, that where wharfage accrued in the seventh ward, the owner of the wharf might distrain therefor in the eleventh ward. 13 Wend. 289. See Lansing *v.* Smith, 4 Wend. 9, 21. Wharfage is not properly a *tax*, like that levied to support government, but rather compensation paid by owners of vessels for accommodation for their boats and merchandize. Swartz *v.* Flatboats, 14 La. An. 243, 1859. If a city is en-

§ 70. By the common law, the *riparian owner* has the right to establish a wharf on his own soil, this being a lawful use of the land.[1] The right is judicially recognized in this country, and riparian proprietors on ocean, lake, or navigable river, have, in virtue of their proprietorship, and without special legislative authority, the right to erect wharves, quays, piers, and landing places on the shore, if these conform to the regulations of the state for the protection of the public, and do not become a nuisance by obstructing the paramount right of navigation. This right has been exercised by the owners of the adjacent land from the first settlement of the country. The right terminates at the point of navigability, unless special authority be conferred, because at this point the necessity for such erections ordinarily ceases. Such structures are presumptively lawful where they are confined to the shore, and no positive law is violated in their erection.[2]

§ 71. The rights of riparian proprietors, in respect to the erection of wharves, are subject to such *reasonable limitations* and restraints as the legislature may think it necessary and expedient to impose. Therefore it is competent for the legis-

titled to the wharfage from public wharfs, and the owner of a lot adjacent to such wharf receives wharfage, he is liable to the city therefor. Baltimore *v.* White (assumpsit), 2 Gill (Md.), 444. The right as between private persons and a city corporation, to the moneys collected for wharfage, may be tried in an action for money had and received. Murphy *v.* City Council, 11 Ala. 586, 1847. See Grant *v.* Davenport, 18 Iowa, 179.

[1] Nicoll *v.* Gardner, 13 Wend. 289, 1835, *per Nelson*, J.; Lansing *v.* Smith, 4 Wend. 9, affirming S. C. 8 Cow. 146; Heeney *v.* Heeney, 2 Denio, 625.

[2] Heeney *v.* Heeney, 2 Denio, 625; Dutton *v.* Strong (action of trespass by owner of vessel against owner of private pier for cutting the vessel loose), 1 Black (U. S.), 23, 1861, distinguished from Heeney *v.* Heeney, above cited. Same principle re-affirmed, Railroad Co. *v.* Schurmier, 7 Wall. 272; Yates *v.* Milwaukee, 10 Wall. 497; State *v.* Jersey City, 1 Dutch. (N. J.) 525, 530; Wetmore *v.* Brooklyn Gas Co. 42 N. Y. 384; Galveston *v.* Menard, 23 Texas, 349; Grant *v.* Davenport, 18 Iowa, 179, *per Wright*, J. But in California, see Dana *v.* Jackson, &c. Co. 31 Cal. 118. As to right to erect wharf by other than riparian owner, on a tidal river, below high water mark, *quære*, see Hagan *v.* Campbell, 8 Port. (Ala.) 9. In this case it is said: "It is clear that no part of such erections can be rested upon the lands of the riparian proprietor, nor can he be excluded from the use of the water, or denied other riparian rights." See People *v.* Davidson, 30 Cal. 379.

lature to pass acts establishing *harbor and dock lines*, and to take away the right of the proprietors to build wharves on their own land beyond the lines, even when such wharves would be no actual injury to navigation.[1]

§ 72. While the riparian proprietor has the right to erect wharves, which are private in their nature, but which may be used by the public by the consent of the owner, express or implied, the right to erect *public* wharves and to demand *tolls* or fixed rates of wharfage is, according to the better view, a franchise, which must have its origin in a legislative grant.[2]

§ 73. If a *municipality* is itself a *riparian proprietor*, this will probably give to it, in the absence of any restrictive provision

[1] Commonwealth *v.* Alger, 7 Cush. 53, 1851. This subject is here very fully and learnedly discussed and examined. See, also, Hart *v.* Mayor, 9 Wend. 571, valuable case, affirming 3 Paige, 213; Wetmore *v.* Brooklyn Gas Co. 42 N. Y. 384; People *v.* Vanderbilt, 26 N. Y. 287; Same *v.* Same, 28 N. Y. 396; Pollard's Lessee *v.* Hagan, 3 How. (U. S.) 212; Hagan *v.* Campbell, 8 Port. (Ala.) 9; Mobile *v.* Eslava, 9 Port. (Ala.) 577, 1839; Railroad Co. *v.* Winthrop, 5 La. An. 36. In Yates *v.* Milwaukee, 10 Wall. 497, Mr. Justice *Miller*, on behalf of the court, speaking of an existing wharf, denied that the city of Milwaukee, under the power to establish dock and wharf lines, could create an artificial and imaginary dock line, hundreds of feet away from the navigable part of the river, and without making the river navigable up to that line, deprive the riparian owners of the right to avail themselves of the advantages of the navigable channel by building wharves and docks to it for that purpose, and said, that if the city deemed the removal of the wharf in question necessary in the prosecution of any general scheme of widening the channel or improving the navigation of the river, it must first make the owner compensation for his property thus taken for the public use.

Municipal control, under legislative grant, over right of riparian owner to wharf out: Baltimore *v.* White, 2 Gill (Md.), 444, 1845; Wilson *v.* Inloes, 11 Gill & J. (Md.) 351. Where, under acts of the legislature, a city had the power to refuse assent to riparian owners to erect wharves, or to allow it upon such terms as they deemed beneficial to navigation and the use of the port of that city, it was held, that the city might make the grant of the right to erect a wharf upon the condition that its exterior margin should constitute a *public* wharf. Baltimore *v.* White, *supra*.

[2] People *v.* Wharf Company, 31 Cal. 34; The Wharf Case, 3 Bland Ch. (Md.) 383; Wiswall *v.* Hall, 3 Paige Ch. 313; Houck on Rivers, Sec. 282; Thompson *v.* Mayor, 11 N. Y. 115. See, as to navigator's right to moor and land, Bainbridge *v.* Sherlock, 29 Ind. 364; Talbott *v.* Grace, 30 Ind. 389; Jeffersonville *v.* Ferry Company, 27 Ind. 100.

in its organic act, the implied authority to erect a wharf thereon, and it would have the incidental right, the same as a private owner, to charge compensation for its use.[1] Its rights would be the same as those of any similar proprietor, and no greater, unless enlarged by legislative grant.

§ 74. All the *powers of a municipality* in respect to wharves and docks must, like all its other powers, be derived from the legislature.[2] In regard to private wharves lawfully erected, the municipal authorities have only such powers of local regu-

[1] Murphy *v.* City Council, 11 Ala. 586, 1847. The court say: "The title to the wharf is in the city, and, such being the fact, it had the same right as any other proprietor to collect wharfage from those landing goods there. This right, resulting from its proprietary interest, is not a franchise, but a right of property." *Ib. per Ormond*, J., p. 558. The city of Boston has, under the laws of Massachusetts, the same rights as other littoral proprietors, and was held not to dedicate a dock, which it owned, to the public, by merely abstaining from any control over it. The court observe: "The people of Boston, who owned the land as their common and private property, acted through a corporation (the city), whose corporate grants and licenses are matters of record. Their own use of their own property for their own benefit cannot be called a dedication of it to *any other public of wider extent*. Whether it was called "town dock" or "public dock" (which were used as synonymous terms), it would furnish no ground to presume that they had parted with their right to govern and use it in the manner most beneficial to the people or public of the town or city." Boston *v.* Lecraw, 17 How. (U. S.) 426, 1854; Commonwealth *v.* Roxbury, 9 Gray, 514, 519, and note. *Bona fide* purchaser of a wharf in the city of Baltimore, erected under contract with city, and in which the city had certain rights, held affected, with notice of those rights. Baltimore *v.* White, 2 Gill (Md.), 444.

[2] Snyder *v.* Rockport, 6 Ind. (Porter), 237, 1855; Railroad Company *v.* Winthrop, 5 La. An. 36. While a city may be enjoined, at the instance of a tax-payer, from raising taxes or appropriating money for the unauthorized construction of a wharf, it will not be restrained from exercising a clear power to grade streets, merely because, by such grading, a wharf at the river end of a street will incidentally result. Snyder *v.* Rockport, above cited. As to right of municipal corporation to erect, or allow others to erect, wharf at *terminus* of street, see Doe *v.* Jones, 11 Ala. 63. In Galveston *v.* Menard, 23 Texas, 349, 1859, the right of the city, under a grant from the legislature, to build and control wharves in front of the streets is affirmed. In Newport *v.* Taylor, 16 B. Mon. 699, 1855, it was decided that the city might build wharves on property dedicated as a "common," along a navigable river. See, also, Louisville *v.* Bank, 3 B. Mon. 144; Kennedy *v.* Covington, 8 Dana, 61.

lation and government as their charters or constituent acts, in general or special terms, confer upon them.[1] Their own right to erect wharves may be express or implied. The power, even when conferred in terms, is, like other powers, to be construed somewhat strictly when it affects private rights, but not so strictly as to defeat the purpose of the grant.[2] Thus, although the corporate boundaries may by the charter be extended to low water mark, and the corporation has express power "to regulate the erection and occupation of all wharves or levees within the corporate limits," this does not give the corporation as against the riparian proprietor (whose right was construed to extend to low water mark), the power to control the river bank so as to require such proprietor or his lessee to take out a license for his wharf-boat, fastened to the shore of his own land, and used for business purposes.[3]

[1] Grant *v.* Davenport, 18 Iowa, 179, 1865. Where the charter of a city authorizes it "to regulate the erection and repair of *private* wharves and the rates of wharfage thereat," "the city," says *Wright*, C. J., "may *regulate*, but not destroy; may exercise control as over other private property within its limits, but not to the extent of appropriating the use and enjoyment thereof to the public without compensation." *Ib.* Liability of city corporation for an injury to a private wharf, caused by diverting streams of water to a point near the wharf, thereby causing a great deposit of sand and earth, which lessened the depth of water at the wharf and impaired its value. Baron *v.* Baltimore, 2 Am. Jurist, 203, cited and approved in Stetson *v.* Faxon, 19 Pick. 147, 1858, and see, also, Thayer *v.* Boston, 19 Pick. 510.

[2] As to the extent of municipal power over public and private wharves, and the respective rights of the riparian owner and municipal authorities, concerning wharves and wharfage: Grant *v.* Davenport, 18 Iowa, 179, 1865; Cincinnati *v.* Walls, 1 Ohio St. 222; Muscatine *v.* Hershey, 18 Iowa, 39; Galveston *v.* Menard, 23 Texas, 348; Baltimore *v.* White, 2 Gill (Md.), 444, 1845; Furman *v.* New York, 5 Sandf. S. C. 16; affirmed, 10 N. Y. 567; Dugan *v.* Baltimore, 5 Gill & Johns. (Md.) 357, 1833; reversing S. C. 3 Bland Ch. 361; Wilson *v.* Inloes, 11 Gill & Johns. (Md.) 358; Shepherd *v.* Municipality, 6 Rob. (La.) 349; Columbus *v.* Grey, 2 Bush (Ky.), 476; Kennedy *v.* Covington, 17 B. Mon. 567: Commissioners *v.* Neil, 3 Yeates (Pa.), 54; Richardson *v.* Boston, 24 How. (U. S.) 188; S. C. 19 *ib.* 263, 17 *ib.* 426; Newport *v.* Taylor, 16 B. Mon. 699, 1855; Commonwealth *v.* Roxbury, 9 Gray, 514, 519, and note by Mr. (since Judge) Gray; Trowbridge *v.* Mayor (right of Albany under Dongan charter), 7 Hill (N. Y.), 429; S. C. 5 *ib.* 71; Hart *v.* Mayor, 9 Wend. 571; Lansing *v.* Smith, 4 Wend. 4; Thompson *v.* Mayor, 11 N. Y. 115; Marshall *v.* Guion, *ib.* 461; Corporation *v.* Scott, 1 Caines, 543. Principles of construction, *ante*, Sec. 55, and notes.

[3] McLaughlin *v.* Stevens, 18 Ohio, 94, 1849; Blanchard *v.* Porter (extent riparian right), 11 Ohio, 138, 144; Muscatine *v.* Hershey, 18 Iowa, 39.

§ 75. So where a riparian proprietor had constructed a wharf which extended to, but did not encroach upon, the navigable part of the river, and which was not shown to be a nuisance in fact, it was held by the Supreme Court of the United States that the city within which the wharf was situated could not, under the charter power to establish dock and wharf lines and restrain and prevent encroachments upon the river and obstructions thereto, pass an ordinance declaring the wharf to be an obstruction to navigation and a nuisance, and ordering it to be summarily abated.[1]

§ 76. If the right to impose wharfage is given to a municipality, but not limited, the question of the *amount* which the municipal authorities may exact is confided to their discretion, and is one with which the courts cannot interfere[2], unless, perhaps, in a case where the by-law imposing it is plainly unreasonable. But the amount of tolls or wharfage may, of course, be regulated by the legislature.[3]

§ 77. The interests of commerce imperatively require that public wharves should be in a *safe condition;* and if a municipal corporation is in possession of such a wharf and exercises control over it, and receives tolls for its use, it owes a duty to the public to keep it in proper and secure condition for use, and it is liable, without statutory enactment to that effect, to

[1] Yates *v.* Milwaukee, 10 Wall. 497, 1870.

[2] Municipality *v.* Pease, 2 La. An. 538, 1847; Muscatine *v.* Hershey, 18 Iowa, 39, 42, 1864, *per Wright*, J.

[3] Baltimore *v.* White, 2 Gill (Md.), 444, 1845; Murphy *v.* City Council, 11 Ala. 586, 1847. Authority to a city "to erect, repair, and regulate wharves and the rates of wharfage," authorizes it to collect wharfage upon goods landed on the bank, the space in front of the city being dedicated to the public, although no artificial wharf was erected. Sacramento *v.* Steamer, 4 Cal. 41. This subject is discussed by *Wright*, J., in Muscatine *v.* Hershey, 18 Iowa, 39, but the point is not decided by the court. In Kentucky, however, it is held that the owner of the land must build wharves, or improve the shore, or make some preparation for the reception or delivery of goods, or accommodation of vessels, before he is entitled to collect tolls or wharfage. Columbus *v.* Grey, 2 Bush (Ky.), 476. If he permits the municipal authorities to so improve the wharves, he will only be entitled to reasonable compensation for the use of the river bank. *Ib.* The word "quay" defined by *McLean*, J., in New Orleans *v.* United States, 10 Pet. 661, 715.

an action for any special injuries to boats and vessels caused by its failure to discharge this duty. In such a case it is not material whether the city had adopted ordinances for the regulation of the wharf, or, having such, neglected to enforce them, as in either event the responsibility is the same.[1]

Ferries.

§ 78. It is not unusual for the legislature to make to a municipal corporation a more or less extensive grant respecting ferries and ferry franchises. Such a grant is not, unless otherwise expressed, a compact which cannot be impaired, but, in the nature of a public law, subject to be repealed or changed, as the public interests may demand.[2] If the legislature has conferred, as in some of the ancient charters in England and in this country, upon a municipal corporation, *its whole power*, to establish and regulate ferries within the corporate limits, the corporation thus representing the sovereign power may make an exclusive grant.[3] But such a corporation has not an *exclusive* power over the subject, unless, by express words or necessary inference, it be plainly and clearly given to it by the legislature. Hence, power to a municipality to establish and

[1] Pittsburg *v.* Grier, 22 Pa. St. 54, 1853. "This case," says *Perley*, C. J., in Eastman *v.* Meredith, 36 N. H. 284, 295, "is put distinctly upon the ground that the public duty, which was the foundation of the action, arose out of the control which the city exercised over the wharf, and the income received for the use of it." That the right to collect wharfage by the city imposes the duty to keep in repair, and a correlative liability, has been often determined. Shinkle *v.* Covington, 1 Bush (Ky.), 617, where there was a failure to provide proper fastenings for boats. People *v.* Albany, 11 Wend. 539, 543; Buckbee *v.* Brown, 21 Wend. 110; Mersey Dock Trustees *v.* Gibbs, 1 Law R. H. L. 93. *Lessee of city* is under like liability. Radway *v.* Briggs, 37 N. Y. 256, 1867. In form, the action in such a case against the city may be either *case* or *assumpsit*. Pittsburg *v.* Grier, 22 Pa. St. 54, 1853. But it is no defence to an action by a city for wharfage, that the wharf is not well built and needed further improvement or repairs. Prescott *v.* Duquesne, 48 Pa. St. 118; Jeffersonville *v.* Ferry Company, 27 Ind. 100.

[2] East Hartford *v.* Hartford Bridge Co. 10 How. (U. S.) 511, 1850. *Ante*, p. 84, Sec. 40. As to extinguishment of ferry franchise by a subsequent legislative grant to build a bridge at the site of the ferry, and take tolls, see Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420, 1837. Construction of special grant, Hartford Bridge Co. *v.* Ferry Co. 29 Conn. 210.

[3] Costar *v.* Brush, 25 Wend. 628, 1841.

regulate ferries within its limits, does not give it an exclusive power, and consequently does not authorize it to confer an exclusive privilege upon others to establish a ferry.[1]

§ 79. By its charter, a city was empowered "to license, continue, and regulate," as many ferries within its limits, to the opposite shore of a river bounding it, as the public good required, and the common council were further authorized "to direct the manner of issuing and registering the licenses, and to prescribe the *sum of money* to be paid therefor into the treasury of the corporation." Under this, an ordinance prohibiting all persons from ferrying, without a license from the mayor, and authorizing this officer to grant licenses to any person upon payment into the treasury of the city of the sum of fifty dollars, was sustained against the objections that there was no power to *prohibit* ferrying without a license, and that the license fee was a *tax*. The words of the charter —"To prescribe the sum of money to be paid into the treasury of the corporation,"— were regarded by the court as showing a clear intent to make licenses a source of revenue to the city; and the court added, that the amount charged as a license fee did not appear to be unreasonable.[2]

§ 80. If a municipal corporation seized of a ferry, lease the same, through the agency of the mayor and aldermen, with a covenant for quiet enjoyment, this covenant will not restrain the mayor and aldermen from exercising the powers vested in them by statute, to license another ferry over the same waters, if, in their judgment (which cannot be reviewed by the courts), the public necessity and convenience require it. On such a covenant the city may be liable to the covenantees; but the powers vested in the city officers, as trustees for the public, cannot be thus abrogated. If, however, the city, in its corpo-

[1] Minturn *v.* Larue, 23 How. (U. S.) 435, 1859; Harrison *v.* State, 9 Mo. 526, 1845; McEwen *v.* Taylor, 4 G. Greene (Iowa), 532. *Ante*, p. 103, note.

[2] Chilvers *v.* People, 11 Mich. 43, 1862. As to distinction between a license fee and a tax, see Ash *v.* People, 11 Mich. 347, and the chapters on Ordinances and Taxation, *post*. Amount of license city may exact, the state law on the subject being held to affect the city, Reddick *v.* Amelia, 1 Mo. 5, 1821.

rate capacity, is the legal owner of an *exclusive* franchise, its grantees or lessees would hold it, notwithstanding any license to others, whether granted by the mayor and aldermen or any other tribunal.[1]

Borrowing Money.

§ 81. We will hereafter treat of the implied power of municipal corporations to issue negotiable securities. But this is a different question from the power to *borrow money*. The power to borrow may be given in express language, in which case the terms and purpose of the grant will measure its extent. But suppose the power is not expressly conferred, does it exist by implication? It is settled, that private corporations, organized for pecuniary profit, have, unless specially restricted, an incidental authority to borrow money for their legitimate purposes, and to give the usual obligations for its re-payment.[2] The question of the *implied authority* of municipal corporations to borrow money has not, perhaps, been so often or so thoroughly considered as to be entirely closed to controversy. In view of the legislative practice to confer, in terms, all powers so important as this, the dangerous nature of

[1] Fay, Petitioner, 15 Pick. 243, 1834. The court will not try on *certiorari* the conflicting titles of parties to a ferry franchise, *ib.* *Ante*, Chap. V. Sec. 61. Rights of municipal corporations in connection with ferries and extent of legislative control; see Fanning *v.* Gregoire *et al.* 16 How. (U. S.) 524, 1853; East Hartford *v.* Hartford Bridge Co. 10 *ib.* 511; affirming S. C. 16 Conn. 149; 17 Conn. 80, 96; Chilvers *v.* People, 11 Mich. 43; O'Neill *v.* Police Jury, 21 La. An. 586; Aiken *v.* Railroad Co. 20 N. Y. 370, 1859, relating to the ferry rights of the city of Albany; Benson *v.* Mayor, &c. of New York, 10 Barb. 223; Harris *v.* Nesbit, 24 Ala. 398; United States *v.* Fanning, Morris (Iowa), 348; Conner *v.* New Albany, 1 Blackf. (Ind.) 43; City *v.* Ferry Co. 27 Ind. 100; Shallcross *v.* Jeffersonville, 26 Ind. 193. The right of a city, given by charter, to license and tax ferries, is not, unless so expressed, exclusive of a like right in the state or county. Harrison *v.* State, 9 Mo. 526, 1845. "Power to *regulate* ferries," given to municipal corporations in general incorporation act, construed, Duckwall *v.* New Albany, 25 Ind. 283. When equity will annul lease, Phillips *v.* Bloomington, 1 G. Greene (Iowa), 498. Upon *division* of an old town owning ferry franchise, the new town owns no interest therein except so far as conferred by the legislature. Hartford Bridge Co. *v.* East Hartford, 16 Conn. 149; *post*, Chap. VII.

[2] Stratton *v.* Allen, 16 N. J. Eq. 229; see, *ante*, p. 67, Sec. 27, and chapter on Contracts, *post*.

this power by reason of the temptation it holds out to incur needless debts and to make extravagant expenditures, and the facilities it offers for frauds, and the settled and salutary doctrine that such corporations have no powers but such as are expressly conferred, and those which are necessary to effect the objects of the corporation, and those which are incidental to the express grants, the author would be strongly inclined to deny the existence of an *implied power* to borrow money. But it must be admitted that the few express adjudications on the subject favor the contrary opinion.

§ 82. The question arose in Ohio, in 1836, and was fully argued and considered. The town of Chillicothe possessed authority to purchase real estate, erect public buildings, repair streets, and the usual municipal powers. The right to borrow money was *not expressly* granted, and the only question in the case (an action upon the bonds of the town given for borrowed money) was, whether it was granted by implication. The case was regarded as of the first impression, no authorities in point being produced. The court distinctly decided, that in carrying out the express powers, or in effecting any legitimate municipal object, the corporation possessed the *incidental* or *implied* right to borrow money.[1] And subsequently the Supreme Court of Wisconsin affirmed the implied authority of a municipal corporation, as incidental to the execution of the general powers granted by its charter, and in the absence of special restriction, to borrow money and issue its bonds therefor, it appearing that the proceeds thereof went into the treasury of the city and were expended by it.[2] "The charter," says the court, stating its reasons, "does confer the power to purchase fire apparatus, cemetery grounds, etc., to establish markets, and to do many other things, for the execution of which money would be necessary as a means. It would seem, therefore, that in the absence of any restriction, the power to borrow money would pass as an incident to these general powers, according to the well-settled rule that corpor-

[1] Bank *v.* Chillicothe, 7 Ohio, part II. p. 31, 1836.

[2] Mills *v.* Gleason, 11 Wis. 470, 1860; S. C. 8 Am. Law Reg. 692; State *v.* Madison, 7 Wis. 688; Clark *v.* Janesville, 10 Wis. 136.

ations may resort to the usual and convenient means of executing the powers granted; for certainly no means is more usual for the execution of such objects than that of borrowing money." In this case, as in the other, the question was not raised until the money had been borrowed and the rights of third persons had attached.[1]

[1] City *v.* Lamson, 9 Wall. 477, 486, 1869, where the Wisconsin cases are referred to by *Nelson*, J. *Ante*, p. 67, Sec. 27, and notes. The right of private corporations generally to *borrow money*, as *incidental* to the express powers granted, is extensively considered upon principle and authority in the important case of Curtis *v.* Leavitt, 15 N. Y. 9, 1857. See, also, Barry *v.* Merch. Ex. Co. 1 Sandf. Ch. 280; Beers *v.* Phœnix Glass Co. 14 Barb. 358; Stratton *v.* Allen, 16 N. J. Eq. 229; Lucas *v.* Pitney (power of railroad company), 3 Dutch. (N. J.) 221; Fay *v.* Noble (manufacturing corporation), 12 Cush. 1; Davis *v.* Prop. &c. of Meeting House (religious corporation), 8 Met. 321. Perhaps it is difficult to draw a distinction between private and municipal corporations in respect to the implied right to borrow money. But we see much more reason for affirming the existence of an incidental power of this kind with respect to trading, banking, manufacturing, and railroad corporations than in relation to municipal corporations. There is a difference between contracting a debt in the prosecution of a legitimate corporate purpose and borrowing money for that purpose. In the one case, the application of the credit is secured to the advancement of the authorized object, while money borrowed is liable to be lost, or to be diverted to illegitimate purposes. It should be remembered, that the express powers can be executed without holding that there is an implied power to borrow money. The revenue provisions of charters supply it with the means designed to furnish it with money. And powers are not held to exist merely because they are convenient. As applicable to municipal corporations, there is great and almost convincing force in the argument of *Selden*, J., in Curtis *v.* Leavitt, *supra*, pp. 267, 268. And see Ketchum *v.* City of Buffalo, 14 N. Y. 356, 365, 1856, where the subject is considered by the same judge, and the power of a municipal corporation to contract debts on credit, for legitimate purposes, and to give a suitable acknowledgment of the indebtedness, is discriminated from the power to borrow money. Whether there is an incidental power to borrow money to carry out authorized corporate purposes, is admitted to be a question which has "yet to be judicially settled." See, on the general subject, Canal Bank *v.* Supervisors, 5 Denio, 517, 1848; Barker *v.* Loomis, 6 Hill, 463, 1844; People *v.* Brennan, 39 Barb. 522, 1863. In Commonwealth *v.* Pittsburgh, 41 Pa. St. 278, *Strong*, J., says, that the power to execute and issue bonds is inseparable from the existence of all corporations, public and private. Douglass *v.* Virginia City, 5 Nevada, 147, 1869. In New York, see Stat. 1853, 1135, Chap. 603.

Recent English Decisions.—Bond for borrowed money, given after the Municipal Corporations Act, held valid: Pallister *v.* Mayor, &c. 9 C. B. 744;

§ 83. Express power to a municipal corporation "to borrow money" includes the power to issue its negotiable bonds, or other usual securities, to the lender.[1] But it does not include the power to issue notes to circulate as money, in violation of the statute law and public policy of the state.[2]

§ 84. A contract whereby a city agrees with an individual that if the latter will pay or advance the amount of interest due and to become due on certain bonds of the city already issued, the city will pay or refund the amount, is not a "borrowing of money" within the terms or spirit of the charter prohibiting the municipal authorities from borrowing money unless authorized by a prior vote of the citizens; such a contract being one simply for the payment of a debt.[3] Under authority to a city to borrow money, it may, if there be no statutory restriction, make the principal and interest payable at the place where the money is borrowed, or where it pleases, though beyond the limits of the state.[4] Among the powers

Payne *v.* Mayor, &c. 3 Hurl. & Nor. 572. See Nowell *v.* Mayor, &c. 9 Exch. 457; Kendall *v.* King, 17 C. B. 483. Note for borrowed money held invalid under the act: Attorney General *v.* Lichfield, 13 Sim. 547; Reg. *v.* Lichfield, 4 Queen's B. 893.

[1] Commonwealth *v.* Pittsburg, 34 Pa. St. 496, 511, 1859; Railroad Co. *v.* Evansville, 15 Ind. 395, 412, 1860; Middleton *v.* Allegheny Co. 37 Pa. St. 241; Reinboth *v.* Pittsburg, 41 Pa. St. 278; Seybert *v.* Pittsburg, 1 Wall. 272; Rogers *v.* Burlington, 3 Wall. 654, 666, *per Clifford*, J.; De Voss *v.* Richmond, 18 Gratt. (Va.) 338; S. C. 7 Am. Law Reg. (N. S.) 589; Galena *v.* Corwith, 48 Ill. 423, 1868. Money borrowed, and note given by officers of a town, without authority, does not bind the town in case it never receives the benefit of it. Benoit *v.* Conway, 10 Allen, 528; People *v.* Supervisors, 34 N. Y. 516.

[2] Thomas *v.* Richmond, U. S. Supreme Court, December, 1871, not yet reported.

Construction of the constitutional power of the general government to "*borrow money.*" See Hepburn *v.* Griswold, 8 Wall. 603, and Knox *v.* Lee, December term, 1871, known as the "legal tender cases."

[3] Gelpcke *v.* Dubuque, 1 Wall. (U. S.) 221, 1863, *Miller*, J., dissenting. Where a city can make such a contract, with the sanction of a prior vote, the sanction will, in an action on such a contract, be presumed until the contrary is shown by the city. *Ib. per Swayne*, J.

[4] Meyer *v.* Muscatine, 1 Wall. (U. S.) 384, 1863. In this case, the court, *per Swayne*, J., say (1 Wall. 391): "The power of a municipal corporation to make any contract does not depend upon the place of performance, but

of a strictly municipal nature conferred upon a city was the power "to borrow money for any object, in its discretion," or "for any public purpose," on a two-thirds vote of the citizens, and this was held, in connection with a general statute of the state recognizing, by implication (as construed), the validity of city and county bonds generally, to authorize such city to issue bonds to aid in the construction of a railway or plank road leading to, through, or from the city.[1]

Limitation on Power to Become Indebted.

§ 85. Provisions are frequently made in constitutions, or in charters or incorporating acts, to prevent the creation or increase of municipal indebtedness beyond certain limits, or except upon certain conditions. The judicial construction of some of these provisions will be noticed in this place. The constitution of Maryland contains a provision that "No debt shall be created by the mayor and city council of Baltimore" (except for specified temporary purposes), unless it shall be first sanctioned by the legislature and approved by the voters of the city. The city being the owner of a large amount of stock in the Baltimore and Ohio Railroad Company, without previous legislative authority or the approval of the voters, passed an

upon its scope and object. A city authorized to establish gas-works and water-works, and to gravel its streets, may buy water, coal, and gravel beyond its limits, and agree to pay where they are found, or elsewhere. The principal power, when expressed, draws to it, by necessary implication, the means of its execution. This is the settled rule in the construction of all grants of authority, whether to governments or individuals." Express authority to a city "to borrow money," necessarily implies the power to determine the time of payment and to issue bonds, or other evidence of indebtedness, to borrow within or without the state, and to agree to pay where borrowed. Railroad Company *v.* Evansville, 15 Ind. 395, 412, 1860, distinguished as to place of payment from Prettyman *v.* Tazwell Co. 19 Ill. 406, 22 *ib.* 147, which were regarded as turning upon peculiar statutory provisions. See, further, chapter on Contracts, *post.*

[1] Meyer *v.* Muscatine, 1 Wall. (U. S.) 384, 1863, *Miller*, J., dissenting, in an opinion of marked ability, Mitchell *v.* Burlington, 4 Wall. 270, 1866; Rogers *v.* Burlington, 3 Wall. 654, 1865. General power granted to a city to create a debt will be construed to means debts for *specified, legitimate, and proper municipal purposes*, and not for any or all purposes, at the discretion of the city council or inhabitants. Lafayette *v.* Cox, 5 Ind. (Porter) 38, 1854. See, further, chapter on Contracts, *post.*

ordinance to provide for the *raising* of one million of dollars, by hypothecating its railroad stock, and for the investment of the same in the bonds of another railroad company in process of construction. The validity of this ordinance being drawn in question, the court considered it to be plain, that the constitutional provision quoted was intended to prohibit the city from aiding in the construction of works of internal improvement without the previous assent of the legislature and of a majority of the voters of the city; and that the ordinance (notwithstanding the ingenious use of the phrase *raising* instead of *borrowing* money, and the further provision that the parties furnishing the money should look for its repayment exclusively to the stock pledged, and that the city should not be responsible for any deficit) did create a debt within the meaning of the constitution, and was therefore void.[1]

§ 86. Under a charter prohibiting the common council of a city from "authorizing any expenditure, for any purpose," in the current political year, exceeding the amount of the annual tax levy, the council cannot authorize any expenditure to be made within the year exceeding the limit; but they are not forbidden to authorize, in that year, an expenditure to be made in a subsequent year, for services to be performed in such subsequent year.[2]

§ 87. A municipal charter provided that it should not be lawful for the city council to make, or authorize to be made, "any contract for the payment of money *beyond the current fiscal year*," declaring every such prohibited contract "illegal

[1] Baltimore *v.* Gill, 31 Md. 375, 1869. That a debt may be *created* by borrowing money, although there be a provision exempting the borrower from liability beyond the property pledged, see Newell *v.* People, 3 Seld. 9, 87.

[2] Weston *v.* Syracuse, 17 N. Y. 110, 1858. See, also, Cook *v.* City of Buffalo, 1 Clinton's N. Y. Digest, "Buffalo," Sec. 2. The charter of a city provided that "no *funded debt* shall be contracted." It was *decided*, that a city bond, issued on time, for the purchase of market grounds, was not a funded debt. Ketchum *v.* Buffalo, 14 N. Y. 356; meaning of "funded debt" and "funding" considered by *Selden*, J., *ib.* p. 367, and by *Wright*, J., p. 378. City may *fund* valid debt and issue its bonds therefor, without express authority. Galena *v.* Corwith, 48 Ill. 423, 1868. How fund, Smith *v.* Morse, 2 Cal. 524. *Ante*, p. 86, Sec. 41; p. 80, Sec. 36.

and void." In construing this language the court say: "By this section of the charter, the legislature have, in the most explicit manner, prohibited the city council from contracting any debt beyond the fiscal year. If the city council had, at the time the contract was made, in 1845, passed an ordinance that the expense of lighting the streets of the city for that year should be paid in 1848, by a tax *then* assessed for that purpose, it would have come within the letter of the prohibition. It is none the less a violation of its spirit, that the council did not pass the ordinance providing for its payment until 1848."[1]

§ 88. If a municipal corporation has the means in its treasury to meet its indebtedness, the issue of warrants to an amount larger than five per cent of its taxable property is not a violation of the section of the state constitution which provides that "no municipal corporation shall be allowed to become indebted, in any manner or for any purpose, to an amount exceeding five per cent of the taxable property within the corporation." In such case it would not become indebted within the meaning of the constitutional clause.[2] An act of

[1] *Per Caldwell*, J., Jonas *v.* Cincinnati, 18 Ohio, 318, 322, 1849. Construction of similar provision in other charters: Goodrich *v.* Detroit, 12 Mich. 279; Philadelphia *v.* Flanigen, 47 Pa. St. 21; Johnson *v.* Philadelphia, *ib.* 382; Wallace *v.* San Jose, 29 Cal. 180; Bladen *v.* Philadelphia, 60 Pa. St. 464, construing an act applying to the city to the effect that no debt shall be binding unless authorized by law or ordinance, and a sufficient appropriation therefor be made.

[2] Dively *v.* Cedar Falls, 27 Iowa, 227, 1869. A contract by the corporation to pay for work when it shall be performed, in the future, does not constitute an indebtedness, within the meaning of this provision of the constitution, until the performance of the work. *Ib.* But *quære.* See Davenport, &c. Gas Co. *v.* Davenport, 13 Iowa, 229. A similar provision exists in the constitution of Illinois and of some other states. The meaning and effect of the Iowa constitution, quoted above, were much discussed before the Supreme Court of Iowa, in a very recent case, in which the question was, Is a city corporation liable to a *bona fide* holder, upon its negotiable bonds issued for value, when at the time of such issue the city was indebted to the full extent of the constitutional limit? The cause was settled before being decided, and no opinions were filed; but the judges differed in their judgment. In the Western Jurist (Vol. VI. p. 1, January, 1872), will be found two able and interesting articles upon the question above stated, containing the arguments upon both sides of it — the one being prepared, as it

the legislature prohibiting counties and cities from thereafter "contracting any debt or pecuniary liability, without fully providing, in the ordinance creating the debt, the means of paying the principal and interest of the debt so contracted," does not extend to ordinary street work, which forms part of the current expenses of the corporation, and which may be paid out of its current revenues.[1]

§ 89. A restrictive provision in a city charter, that the "council shall not create, or permit to accrue, any debts or liabilities which shall exceed" a specified sum, unless a certain course be pursued by the council and approved by a vote of the people, has been considered to have no relation to liabilities arising *ex delicto*, or to those which the law may cast upon the corporation, and to apply, at most, only to contracts or liabilities voluntarily created. The court, indeed, regarded the provision as directory simply, and not as limitation on the power of the council to create debts.[2]

§ 90. Constitutional limitations on *state* indebtedness apply to the state alone, and not to her political and municipal sub-

is understood, by Mr. Justice *Beck*, and the other by Mr. Justice *Cole*, of the Supreme Court of Iowa. The proposition upon which they differ is whether the *power* given to a city to issue its bonds, absolutely ceases, as to innocent holders, the moment the constitutional limit is reached, the same as if it had never been conferred. In view of the language shall not "be allowed;" the course of decision in the United States Supreme Court, elsewhere noticed, protecting the holders of this class of securities; and the impracticability, and even impossibility, of purchasers ever to ascertain, at a given moment, the amount of indebtedness of a corporation, the author, while appreciating the difficulties of the question, is inclined to think that if the power to issue negotiable securities be given, and the inhabitants stand by and allow such bonds to be issued, for value received by the corporation, and sold, that it should be held liable thereon. If the bonds are void, and the city has received value, it would be liable to pay back what it had received from innocent persons, or else the provision of the constitution would operate to ensnare and defraud those who deal with it; and, if thus liable, the constitutional limit may be exceeded in this way, as well as by sustaining the right to recover on the bonds.

As to constitutional provision requiring the legislature to *restrict* the power of municipalities to levy taxes, borrow money, &c. see, *ante*, Chap. III. p. 67, Sec. 27.

[1] Reynolds *v.* Shreveport, 13 La. An. 326, 1858.

[2] McCracken *v.* San Francisco, 16 Cal. 591, 1860.

divisions.[1] A legislative provision prohibiting the *city authorities* from incurring an indebtedness beyond a designated amount, does not apply to the legislature of the state; and the latter may, of course, by a subsequent act, authorize an increase of the amount.[2]

Rewards for Offenders.

§ 91. The governing body of a municipal corporation (which has power to protect the property and promote the welfare of its inhabitants), may offer a reward for the detection of offenders against the general safety of its people, as, for example, those guilty of the crime of arson within the corporate limits.[3] If made by the mayor, it may be ratified by the city council subsequently, and is binding upon the city, though not so ratified until after the performance of the service for which the reward is claimed.[4] A promise to reward an officer for doing that which, without such reward, it was his duty to

[1] Pattison *v.* Supervisors, 13 Cal. 175, 1869; Cass *v.* Dillon, 2 Ohio St. 607, 1853; Slack *v.* Railroad Company, 13 B. Mon. 16; Clark *v.* Janesville, 10 Wis. 136; Prettyman *v.* Supervisors, 19 Ill. 406. See People *v.* Supervisors, 16 Mich. 254, and Mr. Justice *Lowe's* individual opinion — not the court's — in State *v.* County of Wapello, 13 Iowa, 388, 418–422; Dubuque County *v.* Railroad Company, 4 G. Greene, 1; Dean *v.* Madison, 7 Wis. 688.

[2] Amey *v.* Allegheny City, 24 How. (U. S.) 364, 1860. Construction of particular limitation: *Ib.* See, on the general subject, Wallace *v.* Mayor, 29 Cal. 180; Wyncoop *v.* Society, 10 Iowa, 185; Rice *v.* Keokuk, 15 Iowa, 579; Gibbon *v.* Railroad Company, 36 Ala. 410; Foote *v.* Salem, 14 Allen, 487.

[3] York *v.* Forscht, 23 Pa. St. 391, 1854; Crawshaw *v.* Roxbury, 7 Gray, 374, 1856. Such an offer is not void for ambiguity, and entitles a person to the reward who gives information to the police officers of the city upon which the incendiary is arrested, he being afterwards convicted. The power of towns in Maine to offer rewards denied: Gale *v.* South Berwick, 51 Maine, 174. See Lee *v.* Flemingsburg, 7 Dana, 59.

[4] Crawshaw *v.* Roxbury, *supra.* Under a statute authorizing the mayor and city council of any city, or the selectmen of any town, to offer and pay from the treasury of such city or town a suitable reward, not exceeding $300, for apprehending and securing a person charged with a capital or other high crime, any city or town may be bound by an offer of a reward in such cases; and any person who performs the service, relying upon such offer, may, in action of *assumpsit*, recover the amount offered of such city or town. Janvrin *v.* Exeter, 48 N. H. Requisites of declaration where reward is offered by a town, see Codding *v.* Mansfield, 7 Gray, 272.

do, is void. Such a promise is, on general principles, *without consideration*, if, indeed, it be not illegal.[1] Therefore, a watchman of a city, who, while in the discharge of his duty as such, discovers a person in the act of committing a crime, cannot recover from the city a reward offered by it.[2]

Public Buildings.

§ 92. Power to the officers or to one of the departments of a municipal corporation, to provide for repairs to public buildings, does not give authority to *erect* a new building, and certainly not a large and expensive edifice.[3] But power to a municipal corporation to rebuild or repair carries with it the right to determine plan and mode.[4]

Police Powers and Regulations.

§ 93. Many of the powers most generally exercised by municipalities are derived from what is known as the *police power* of the state, and are delegated to them to be exercised for the public good. Of this nature is the authority to suppress nuisances, preserve health, prevent fires, to regulate the use and storing of dangerous articles, to establish and control markets, and the like. These and other similar topics will be consid-

[1] Stotesbury *v.* Smith, 2 Burr. 924; 3 Kent Com. 185; Harris *v.* Watson, Peake, 72; Stilk *v.* Myrick, 2 Campb. 317; Bridge *v.* Cage, Cro. Jac. 103. See chapter on Corporate Officers, *post.*

[2] Pool *v.* Boston, 5 Cush. 219, 1849; Gilmore *v.* Lewis, 12 Ohio, 281; Means *v.* Hendershott, 24 Iowa, 78; Chap. IX. *post.*

[3] Peterson *v.* Mayor, &c. 17 N. Y. 449, 455, *per Denio*, J. Contract between city and county in respect to public buildings: Bergen *v.* Clarkson, 1 Halst. (N. J.) 352, 1796; De Witt *v.* San Francisco, 2 Cal. 289, 1852.

[4] Ely *v.* Rochester, 26 Barb. 133, 1837. As to power to build *town house.* French *v.* Quincy, 3 Allen, 9. Incidental power to provide suitable accommodations for the transaction of the business of the corporation. People *v.* Harris, 4 Cal. 9; see Vanover *v.* Davis, 27 Geo. 354; chapter on Corporate Property, *post.* Council have power to fit up and furnish the room in which they meet, and the court refused to enjoin them from furnishing the council chamber with portraits of the governors of the state. Reynolds *v.* Mayor of Albany, 8 Barb. 597; People *v.* Harris, 4 Cal. 9; but see Hodges *v.* Buffalo, 2 Denio, 110; Stetson *v.* Kempton, 13 Mass. 272, 1816, *per Parker*, C. J. *Proper uses* of public buildings: Scofield *v.* School District, 27 Conn. 499; French *v.* Quincy, 3 Allen, 9.

ered in appropriate places. But it may here be observed, that every citizen holds his property subject to the proper exercise of this power, either by the state legislature directly, or by public corporations to which the legislature may delegate it. Laws and ordinances relating to the comfort, health, convenience, good order, and general welfare of the inhabitants, are comprehensively styled, "Police Laws or Regulations." And it is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. The citizen owns his property absolutely, it is true; it cannot be taken from him for any private use whatever, without his consent, nor for any public use without compensation; still he owns it, subject to this restriction, namely: that it must be so used as not to injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors or the citizens generally. These regulations rest upon the maxim, *salus populi suprema est lex.* This power, to restrain a private injurious use of property, is very different from the right of eminent domain. It is not a taking of private property for public use, but a salutary restraint on a noxious use by the owner, contrary to the maxim, *sic utere tuo ut alienum non lædas.*[1]

[1] Baker *v.* Boston, 12 Pick. 184, 1831 (as to nuisances); Wadleigh *v.* Gillman, 12 Maine, 403 (as to wooden buildings); Vanderbilt *v.* Adams, 7 Cowen, 349 (as to harbor regulations, where the general principle upon which police laws rest, is very satisfactorily discussed by *Woodworth*, J.); Commonwealth *v.* Alger, 7 Cush. 53, 84 (valuable opinion by *Shaw*, C. J.); Coates *v.* Mayor, &c. of New York, 7 Cowen, 585 (as to ordinance prohibiting the interment of the dead within the city); Gozsler *v.* Georgetown, 6 Wheat. 181 (as to power to grade). Speaking of turnpike acts, paving acts, &c. Lord Kenyon, in the case of the Governor, &c. *v.* Meredith, 4 Term Rep. 790, 796, says: "Some individuals suffer an inconvenience under all these acts of parliament; but the interests of individuals must give way to the accommodation of the public." And *per Buller*, J., in same case: "There

Prevention of Fires.

§ 94. The prevention of damage by fire is usually an object within the scope of municipal authority, either by express grant or by the power, in a chartered town or city, to make police regulations or needful by-laws. And where such is the case, the town or municipal body is authorized to appropriate money for the purchase of fire-engines, or for the repair thereof, if used for the purpose of extinguishing fires therein; and this, whether they belong to the corporation or were purchased by private subscription.[1] And money may also be appropriated for the benefit of engine and hook and ladder companies therein.[2]

Quarantine and Health.

§ 95. The preservation of the public health and safety is often made a matter of municipal duty, and it is competent for the legislature to delegate to municipalities the power to regulate, restrain, and even suppress, particular branches of busi-

are many cases in which individuals sustain an injury, for which the law gives no action; for instance, pulling down houses, or raising bulwarks, for the preservation and defence of the kingdom against the king's enemies." But "the law will not allow the right of property to be invaded, under the guise of a police regulation for the preservation of health, when it is manifest that such is not the object and purpose of the regulation." *Per Wilde*, J., in Austin *v.* Murray, 16 Pick. 126; Greene *v.* Savannah, 6 Geo. 1, 1849; People *v.* Hawley, 3 Mich. 330; Ames *v.* County, 11 Mich. 139. The extent of the police power will be further discussed in the chapter on Ordinances, *post.* See, also, Cooley Const. Lim. 572–594. How far and when, cities, in executing police duties, are agents of the state, and not of the municipality. See Buttrick *v.* Lowell, 1 Allen, 172; Mitchell *v.* Rockland, 51 Maine, 118, 122; State *ex rel.* &c. *v.* St. Louis County Court, 34 Mo. 356; White *v.* Kent, 11 Ohio St. 550; Thomas *v.* Ashland, 12 *ib.* 127; City Council *v.* Payne, 2 Nott & McCord (South Car.), 475; People *v.* Hurlburt, Supreme Court Mich. 1871, not yet reported. *Ante*, p. 78, Sec. 34.

[1] Allen *v.* Taunton, 19 Pick. 485, 1837; Huneman *v.* Fire District, 37 Vt. 40; Robinson *v.* St. Louis, 28 Mo. 488 (repair of engine house); Wadleigh *v.* Gillman, 12 Maine, 403; Vanderbilt *v.* Adams, 7 Cowen, 349, 352.

[2] Van Sicklen *v.* Burlington, 27 Vt. (1 Wms.) 70, 1854. Approving, Allen *v.* Taunton, *supra.* See *post*, chapter on Ordinances. Power of council over fire companies, and to appoint officers therefor. See Miller *v.* Savannah Fire Co. 26 Geo. 678.

ness, if deemed necessary, for the public good.[1] The subject will be considered more in detail in the chapter on Ordinances. The general nature and scope of the authority as it is not unfrequently bestowed, are well illustrated by a case in Maryland. By its charter the city of Baltimore was vested with "full power and authority to enact all ordinances necessary to preserve the health of the city, prevent and remove nuisances, and to prevent the introduction of contagious diseases within the city and within three miles of the same." Commenting on this provision of the charter, the Court of Appeals say: "The transfer of this salutary and essential power is given in terms as explicit and comprehensive as could have been used for such a purpose. To accomplish, within the specified territorial limits, the objects enumerated, the corporate authorities were clothed with all the legislative powers which the general assembly could have exercised. Of the degree of necessity for such municipal legislation, the *Mayor and City Council of Baltimore* were the exclusive judges. To their sound discretion is committed the selection of the means and manner (contributory to the end) of exercising the powers which they might deem requisite to the accomplishment of the objects of which they were made the guardians. 'To prevent the introduction of contagious diseases within the city, and within three miles of the same,' they might impose heavy penalties on the captain, owner, or consignee of any ship or other vessel entering the port of Baltimore, on board of which small-pox or other contagious diseases might prevail, or they might seek the accomplishment of their object by causing the vessel and all persons to be taken possession of and controlled until their purification and disinfection were effected, and impose on the captain, owner, or consignee, the payment or reimbursement of all the expenses incurred by such proceedings; or they might adopt, at the same time, both suggested remedies, if for the successful and faithful execution of their powers they deemed it necessary to do so." [2]

[1] Shrader, *Ex parte*, 33 Cal. 279, 1867; Asbrook *v.* Commonwealth, 1 Bush (Ky.), 139, 1866; Tucker *v.* Virginia City, 4 Nev. 20.

[2] Harrison *v.* Baltimore, 1 Gill (Md.), 264, 1843. *Ante.* p. 106, Sec. 58.

§ 96. And it was held, that, under this authority, it was competent for the city to pass an ordinance providing for the appointment of a "health officer," prescribing his duties and powers; and that the city might recover from the consignee of a vessel, and was not confined to the charterer, the expenses incurred by it in disinfecting and purifying the vessel, persons, and baggage on board of her at the time of her arrival, from the infection of the small pox. Respecting the extent of liability, the court decided, that the defendant was not entitled to an instruction that the recovery must be limited to the amount of expenses absolutely necessary to preserve the health of the city, or to prevent the introduction of the small pox. On this point the court expressed its judgment to be that, "if the health officer" (on whom the duty of disinfecting the vessel was imposed by ordinance), in causing expenses, "acted *bona fide*, within the limits of a sound discretion, and with reasonable skill and judgment, in the discharge of his official duties, the reasonable expenses thus incurred must be paid." Concerning the power of the corporation over the persons on board of an infected vessel, the court was of opinion, that it was competent for the health officer to be authorized, by ordinance, to send persons laboring under infectious disease to the hospital, and also those on board of the vessel liable to be affected by the disease, if, in his opinion, such a course be necessary to prevent the spread of disease; and the owner, master, or consignee may be made liable for expenses thus incurred, if the health officer acts with reasonable skill and judgment, and exercises a sound and honest discretion.[1]

§ 97. A city having power to pass ordinances respecting the *police* of the place, and to preserve *health*, is authorized, as a sanitary and police regulation, to contract to procure a *supply of water*, by boring an artesian well, or otherwise, on the public square, and is the judge of the mode best adapted to accomplish the object.[2]

[1] Harrison *v.* Baltimore, 1 Gill (Md.), 264, 1843.

[2] Livingston *v.* Pippin, 31 Ala. 542, 1858. As to water-works: Rome *v.* Cabot, 28 Ga. 50; Hale *v.* Houghton, 8 Mich. 458. A municipal corporation owning lands on a water course, distant from the city, to supply its inhab-

Indemnifying Officers.

§ 98. Where a municipal corporation has no interest in the event of a suit, or in the question involved in the case, and where the judgment therein can in no way affect the corporate rights or corporate property, it cannot assume the defence of the suit, or appropriate its money to pay the judgment therein; and warrants or orders based upon such a consideration are void.[1] But a municipal corporation has power to indemnify its officers against liability which they may incur in the *bona fide* discharge of their duties, although the result may show that the officers have exceeded their legal authority.[2] Thus, it may vote to defend suits brought against its officers for acts done in good faith in the exercise of their office.[3] So, if a public corporation is charged with the duty of repairing highways, and is made liable for defects therein, it has the *incidental* power to indemnify an officer who digs a ditch for the purpose of raising a legal question as to the bounds of the highway.[4]

§ 99. So, a vote by a town to refund money paid by assessors on an illegal assessment of a *town* tax made by them, is an express promise, founded upon a meritorious and legal con-

itants with water, has no right (unless acquired by purchase or by the exercise of the right of eminent domain) to divert water to the injury of other riparian proprietors. Stein *v.* Burden, 24 Ala. 130, 1854; *ante*, p. 42.

[1] Halstead *v.* Mayor, &c. of N. Y. 3 Comst. 430, 1850, affirming S. C. 5 Barb. 218, and deciding that corporate funds cannot be appropriated to pay penalties personally incurred by officers for refusing to discharge their official duties; refer to, in explanation, Morris *v.* The People, 3 Denio, 381. And see, also, People *v.* Lawrence, 6 Hill, 244, holding that the supervisors of a county had no right to appropriate money to defray the costs of a justice of the peace who had been prosecuted for official misconduct and acquitted; recognized in Bank *v.* Supervisors, 5 Denio, 517, 521. Same principle, Merrill *v.* Plainfield, 45 N. H. 126.

[2] Pike *v.* Middleton (indemnifying tax collector), 12 N. H. 278, 1841; Fuller *v.* Groton, 14 Gray, 340; Briggs *v.* Whipple, 6 Vt. 95, 1834; Bancroft *v.* Lynnfield, 18 Pick. 566, 1836; Nelson *v.* Milford, 7 Pick. 18, 26, 1828; Babbitt *v.* Savoy, 3 Cush. 530, 1849; Hasdell *v.* Hancock, 3 Gray, 526, 1853. In Page *v.* Frankford, 9 Greenl. 115, this was left an open question.

[3] *Ib.* Baker *v.* Windham, 13 Maine (1 Shep.), 74, 1836.

[4] Bancroft *v.* Lynnfield, *supra.*

sideration, and is irrevocably binding upon the town. And this, although, without such vote, the town could not have been compelled to refund or indemnify the assessors. But such a vote, by a town, would be without consideration in respect to *state* and *county* taxes.[1] So, if the town is not concerned, having nothing to lose or gain in the result of the litigation, a vote to indemnify an officer would be in excess of its power, and void;[2] but it would be otherwise if the suit against the officer was in respect to matters in which the corporation was interested.[3]

Furnishing Entertainments.

§ 100. Without express power, a public corporation cannot make a contract to provide for celebrating the Fourth of July, or to provide an entertainment for its citizens or guests. Such contracts are void, and although the plaintiff complies therewith on his part, he cannot recover of the corporation.[4]

[1] Nelson *v.* Milford, 7 Pick. 18, 1828. A separate action, on such a vote, lies against the town in favor of each assessor for his share, which does not include, however, his own tax, paid by him voluntarily. *Ib.*

[2] Vincent *v.* Nantucket, 12 Cush. 105, 1853. "A promise to indemnify a tax collector if he would collect, by pretence of his official authority, a tax which he knew was illegal, would be an agreement to violate the law, and could not be enforced." Pike *v.* Middleton, 12 N. H. 281, *per Gilchrist*, J. Selectmen, under their authority "to order and manage all of the prudential affairs of the town," may bind the town thus to indemnify its officers. 12 N. H. 281, *supra; ante*, p. 39, Sec. 13, and notes.

[3] Briggs *v.* Whipple, 6 Vt. 95, 1834.

[4] Hodges *v.* Buffalo, 2 Denio (N. Y.) 110, 1846. Same principle: Cornell *v.* Guilford, 1 Denio, 510; Hood *v.* Lynn, 1 Allen (Mass.), 103, 1861; Gerry *v.* Stoneman, *ib.* 319. Nor to celebrate surrender of Cornwallis: Tash *v.* Adams, 10 Cush. 252, 1852. Nor can towns in Massachusetts vote money for the purchase of uniforms for an artillery company: Claflin *v.* Hopkinton, 4 Gray, 502, 1855. "Corporations," says *Jewett*, J., in Hodges *v.* Buffalo, 2 Denio, 110, have no other powers than such as are expressly granted, or such as are necessary to carry into effect the powers expressly granted." In New York there is a statutory declaration of this common law principle. 1 Rev. Sts. 599, Secs. 1–3. "Until the case of Hodges *v.* Buffalo, 2 Denio, 110, nothing," says *Pratt*, J., 3 Comst. 433, "was more frequent than for city authorities to vote largesses and give splendid banquets for objects and purposes having no possible connection with the growth or weal of the body politic, thus subjecting their constituents to unnecessary and oppressive taxation." *Ante*, p. 101, Sec. 55; *post*, Chap. XXII.

Impounding Animals.

§ 101. Power to *impound and forfeit* domestic animals must be expressly granted to the corporation, and laws or ordinances authorizing the officers of the corporation to impound, and, upon taking specified proceedings, to sell the property, are penal in their nature, and where doubtful in their meaning will not be construed to produce a forfeiture of the property, but rather the reverse. And the pound-keeper cannot justify in an action brought against him by the property owner unless he has strictly complied with all the requisites of the law under which he acts. Thus, if he sells without giving the requisite notice, or for the full length of time required, he is liable, although the owner sustains no actual injury from the omission, or the owner may treat the sale as void and recover his property.[1] A statute directing the mayor to issue a warrant

[1] White *v.* Tallman, 2 Dutch. (N. J.) 67, 1856; Willis *v.* Legris, 45 Ill. 289; *ib.* 218; Rounds *v.* Stetson, 45 Maine, 596, 1858; Gilmore *v.* Holt, 4 Pick. 258, 1826; Rounds *v.* Mansfield, 38 Maine, 586, 1854; Smith *v.* Gates, 21 Pick. 55, where the rule in the text was applied, although the sale was made only twenty minutes before the expiration of the time required by law. So actual knowledge, by the owner of the beasts, of the impounding thereof, is not equivalent to the *written notice* required by statute. Coffin *v.* Field, 7 Cush. 355. Abridgement of the required notice for the shortest period avoids the sale; and so does a sale, at one bidding, of two animals having different owners. Clark *v.* Lewis, 35 Ill. 417, 1864. Purchaser must show a regular and authorized sale when his title is questioned by the former owner. *Ib.* Breach of a pound, and liberating an animal therein confined, is no violation of an ordinance prohibiting "any person from opposing or interrupting any city officer in the execution of the ordinances of the city." Mayor, &c. *v.* Omburg, 22 Geo. 67, 1857. Marshal must strictly comply with the ordinance, or he becomes a trespasser from the beginning: 13 Pick. 384; 4 *ib.* 258; 21 *ib.* 55; 13 Met. 407; 7 Cush. 355; 9 Pick. 14; 12 Met. 118; 23 Pick. 255; 12 Met. 198. Owner cannot legally break pound and rescue animals: 5 Pick. 514; 5 Cush. 267. Pound defined: 2 Cush. 305. Marshal cannot delegate his authority to others to impound for him generally, and in his absence, but may have assistants to act in concert with him: Jackson *v.* Morris, 1 Denio, 199. Officers must use the public pound: 1 Rhode Island, 219. Replevin does not lie against a pound-keeper, at common law, while the creatures are in his legal custody: Co. Litt. 47 B; *ib.* 145 B; 1 Chit. Pl. 159; Pritchard *v.* Stevens, 6 Durn. & E. 522; Isley *v.* Stubbs, 5 Mass. 283; Smith *v.* Huntington, 3 N. H. 76; but it does lie if he voluntarily parts with his legal control over them, or if he impounds them in any other places than those prescribed by the law, as, for example, in his pasture or barn, although this be done the more conveniently to furnish them

annually, within ten days from July 1st, commanding police officers to kill all dogs not licensed according to law, "whenever and wherever found," is not in conflict with the constitution of Massachusetts.[1]

Party Walls.

§ 102. Power in a charter to pass ordinances "to authorize the erection of party walls and fences, and to regulate them," includes the power to authorize their erection upon the application of either owner, and without the consent of the other; and such an ordinance is not unconstitutional because compensation is not provided for the land occupied by the wall.[2]

Public Defence.

§ 103. During the late rebellion, acts were passed by many of the legislatures of the adhering states, in effect authorizing municipalities to raise money, by loans and taxation, to pay bounties to volunteers, to enable the municipality to fill its quota under the calls of the president for troops, and thereby avoid an anticipated draft. The constitutional principles involved in legislation of this character will be found learnedly

with food and drink: Bills *v.* Kinson, 1 Foster (N. H.), 448, 1850. In New Hampshire, if creatures are found "doing damage," they may be impounded and appraisers are to ascertain "whether *any* damage was done;" held that the statute contemplated *actual*, and not merely nominal, damages to justify impounding: Osgood *v.* Green, 33 N. H. 318, and cases cited. As to power to take up and forfeit animals at large, see, also, chapter on Ordinances, *post.*

[1] Blair *v.* Forehand, 100 Mass. 136. The act of July 3d, 1863, entitled "an act in relation to damages occasioned by dogs," so far as it undertakes to charge the owner with the amount of damage done by his dog as fixed by the selectmen of the town, without an opportunity to be heard, is unconstitutional; because it is contrary to natural justice and not within the scope of legislative authority conferred by the constitution on the general court, and also because it is in violation of the provision of the bill of rights, which secures the right of trial by jury in all controversies concerning property, except in cases where it had not theretofore been used and practiced: East Kingston *v.* Towle, 48 N. H. The legislature have power to make towns liable for damage done within their limits by dogs, and to give towns a right of action to recover the actual damage from the owners of the dogs: *Ib.*

[2] Hunt *v.* Ambruster, 17 N. J. Eq. 208, 1865.

discussed in the cases below cited, which fully establish the validity of such legislation.[1] But, without express authority, a municipality possesses no such power;[2] yet, if exercised, it may be validated by subsequent legislative action.[3]

Aid to Railway Companies.

§ 104. The most noted of extra-municipal powers conferred upon municipalities and public corporations is the authority to aid in the construction of railways by subscribing to their stock, and taxing the inhabitants or the property within their limits to pay the indebtedness thereby incurred. Legislation of this kind had its origin within a period comparatively recent, and has been more or less resorted to, at times, by almost every state in the Union. As it is an author's duty, in a work of this character, to state what the law is, rather than what, in his judgment, it ought to be, he feels constrained to admit that a long and almost unbroken line of judicial decisions in the courts of most of the states has established the principle that, in the absence of special restrictive constitutional provisions, it is competent for the legislature to authorize a municipal or public corporation to aid, in the manner above indicated, the construction of railways running near, or to, or through them. The cases on this subject are referred to in the note;[4] but,

[1] Speer *v.* School Directors, 50 Pa. St. 150, two judges dissenting; Broadhead *v.* Milwaukee, 19 Wis. 652; Booth *v.* Woodbury, 32 Conn. 118; Shackford *v.* Newington, 46 N. H. 415; Lowell *v.* Oliver, 8 Allen (Mass.), 247; Freeland *v.* Hastings, 10 Allen, 570; Comer *v.* Folsom, 13 Minn. 219; Cooley, Const. Lim. 219–229; Veazie *v.* China, 50 Maine, 518.

[2] Stetson *v.* Kempton, 13 Mass. 272; Fiske *v.* Hazzard, 7 Rh. Is. 438; Shackford *v.* Newington, *supra; ante*, p. 41.

[3] Booth *v.* Woodbury, 32 Conn. 118; Kunkle *v.* Franklin, 13 Minn. 127; Comer *v.* Folsom, 13 Minn. 219; *ante*, p. 92, Sec. 46.

[4] Goddin *v.* Crump (act authorizing the city of Richmond to subscribe stock in a company incorporated to improve the navigation of the James river, and to build a road to the falls of the Kanawha river), 8 Leigh (Va.), 120, 1837. This is the earliest case of the class. Bridgeport *v.* Railroad Company, 15 Conn. 475, 1843; Society, &c. *v.* New London, 29 Conn. 174; Nichol *v.* Nashville, 9 Humph. (Tenn.) 252, 1848; Powers *v.* Superior Court, 23 Geo. 65, 1857; Talbot *v.* Dent, 9 B. Mon. (Ky.) 526, 1849; Slack *v.* Railroad Company, 13 *ib.* 1, 1852; Maddox *v.* Graham, 2 Met. (Ky.) 56; Commonwealth *v.* McWilliams, 11 Pa. St. 61, 1849; Sharpless *v.* Mayor, &c. 21 *ib.* 147; *ib.* 188; Commonwealth *v.* Perkins, 43 Pa. St. 410; 47 *ib.* 189; Cotton *v.*

notwithstanding the opinion of so many learned and eminent judges, there remain serious doubts as to the soundness of the principle, viewed simply as one of constitutional law. Regarded in the light of its effects, however, there is little hesitation in affirming that this invention to aid private enterprises has proved itself baneful in the last degree.

County Commissioners, 6 Flor. 610, 1856; Railroad Company *v.* Commissioners, 1 Ohio St. 77, 1852; Cass *v.* Dillon, 2 *ib.* 607, 1853; Ohio *v.* Commissioners, &c. 6 *ib.* 280; 7 *ib.* 327; 8 *ib.* 394; 12 *ib.* 596, 624; 14 *ib.* 569; Strickland *v.* Railroad Company, 27 Miss. 209; City *v.* Alexander, 23 Mo. 483, 1856; 39 *ib.* 485; Leavenworth County *v.* Miller, Supreme Court of Kansas, 1871, 6 Kansas (not yet reported). The opinion of *Valentine*, J., covers the whole ground of controversy. *Kingman*, C. J., concurred, and *Brewer*, J., dissented. Clarke *v.* Rochester, 24 Barb. 446, 1857; Bank of Rome *v.* Rome, 18 N. Y. 38, 1858; Starin *v.* Genoa, 23 N. Y. 431, 1861; People *v.* Mitchell, 35 N. Y. 551, 1866; Police Jury *v.* Succession of McDonough, 8 La. An. 341; Aurora *v.* West, 9 Ind. 74, 1857; 22 *ib.* 88; Robinson *v.* Bidwell, 22 Cal. 379; Stein *v.* Mayor, &c. 24 Ala. 591, 1854; Gibbons *v.* Railroad Company, 36 Ala. 410; Prettyman *v.* Supervisors, 19 Ill. 406, 1858; S. P. 24 *ib.* 75, 208; Butler *v.* Dunham, 27 Ill. 474, 1861; Robertson *v.* Rockford, 21 Ill. 451; and see, also, as to authority to precinct to levy tax to maintain a bridge, Shaw *v.* Dennis, 5 Gilm. (Ill.) 405; San Antonio *v.* Jones, 28 Texas, 19; Copes *v.* Charleston, 10 Rich. (S. C.) 136, 1857; Augusta Bank *v.* Augusta, 49 Maine, 507; Clark *v.* City, &c. 10 Wis. 136; *ib.* 195, 1859 (compare, Whiting *v.* Sheboygan Railroad Company, *infra*). The Supreme Court of Wisconsin, in an opinion delivered in Phillips *v.* Albany, at the June term, 1871, say, the power of the legislature to authorize municipal subscriptions to the stock of railroads is settled by former decisions in this state, as well as in other states, though the majority of this court would be disposed to deny the power, if it were a new question. The Supreme Court of the United States have intimated, if not decided, that the power may be conferred by the legislature. Thompson *v.* Lee County, 3 Wall. 327; Knox County *v.* Aspinwall, 21 How. (U. S.) 539, 547, 1858; Zabriskie *v.* Railroad Company, 23 *ib.* 381; Amey *v.* Mayor, 24 *ib.* 365, 376; Gelpcke *v.* Dubuque, 1 Wall. 175, 1863; Mercer County *v.* Hacket, *ib.* 81; Meyer *v.* Muscatine, *ib.* 384. Caldwell *v.* Justices, 4 Jones (N. C.) Eq. 323; Taylor *v.* Newberne, 2 *ib.* 141, 1855. In Iowa the constitutionality of railroad subscriptions by municipalities was first (1853) affirmed in Dubuque County *v.* Railroad Company, 4 G. Greene, 1; afterwards (1862) denied, State *v.* Wapello County, 13 Iowa, 388; denial adhered to down to 1869, Hanson *v.* Vernon, 27 Iowa, 28; but note the virtual, yet not acknowledged, overthrow of the line of decisions denying the power, in Stewart *v.* Polk County, 30 Iowa, 1, 1870. The legislative and judicial history of the subject is fully stated in King *v.* Wilson, 1 Dillon's C. C. R. 555, 1871. By the constitution of Tennessee, the legislature has power to authorize counties and incorporated towns to impose taxes for "county and corporation purposes." In Nichol *v.* Mayor, &c. of Nashville, 9 Humph.

§ 105. It is not proposed here to enter into a discussion of the constitutional principles involved in such legislation. The arguments in favor of the power are fully presented in the leading case of Sharpless *v.* The Mayor,[1] and against it in Hansen *v.* Vernon,[2] in Whiting *v.* Sheboygan Railway Company,[3] and in The People *v.* Township Board,[4] to which, and to the

252, 1848, it was held, notwithstanding this provision, that the legislature possessed the power to authorize municipal corporations to subscribe for the stock of railway companies whose roads run to or near such corporations, and that this *was a legitimate corporate purpose.* So, in Florida, held to be a "county purpose," within the meaning of the constitution; but *quære?* There is nothing in the constitution of Alabama prohibiting the legislature from authorizing a municipal corporation to levy a tax on the real estate within the corporation to aid in the construction of a railroad, even though the road extends beyond the limits of the corporation, or even of the state. So held, in Stein *v.* Mobile, 24 Ala. 591, 1854. An act authorizing a municipal corporation to borrow money to aid in the construction of a railroad, upon the written assent of two-thirds of the resident tax-payers, or upon the approval of two-thirds of the tax-paying electors, is constitutional and valid; and it is not open to the objection that it submits a legislative question to the town: Starin *v.* Genoa, 23 N. Y. 439, 1861; Gould *v.* Sterling, *ib.* 439, 456; Bank of Rome *v.* Rome, 18 N. Y. 38. These cases distinguished on this point from Barto *v.* Himrod, 4 Seld. 483. *Ante*, p. 63, Sec. 23.

[1] Sharpless *v.* Mayor, 21 Pa. St. 147. Am. Law Rev. Oct. 1870.

[2] Hanson *v.* Vernon, 27 Iowa, 28, 1869.

[3] Whiting *v.* Sheboygan Railway Co. 9 Am. Law Reg. (N. S.) 156, 1870; S. C. 25 Wis. opinion by *Dixon*, C. J.

[4] People *v.* Township Board, 9 Am. Law Reg. (N. S.) 487, and notes, 1870; S. C. 20 Mich. "Bonds like these are of modern invention, and when counties and towns were decoyed into the use of them for the purpose of railroad corporations, they had to obtain enabling statutes before they could prostitute municipal seals to any such purpose. And as soon as the people [of Pennsylvania] began to feel the consequences of applying the fundamental principle of commercial paper to their bonds, they altered their organic law so as to render such bonds and enabling statutes impossibilities in the future." *Per Woodward*, C. J., County *v.* Brinton, 47 Pa. St. 367, 1864. The evil of these subscriptions was the cause of the amendment to the constitution. *Per Read*, J., Pennsylvania Railroad Co. *v.* Philadelphia, *ib.* 193. The amended constitutional provision in Pennsylvania is as follows: "The legislature shall not authorize any county, city, borough, township, or incorporated district, by virtue of a vote of its citizens, or otherwise, to become a stockholder in any company, association, or corporation, or obtain money for, or loan its credit to, any corporation, association, institution, or party." Sec. 7, Art. XI. Amendment to Constitution, 1857. See Pennsylvania Railroad Co. *v.* Philadelphia, 47 Pa. St. 189, for construction of this amendment.

other cases before cited, the reader is referred. The judgments affirming the existence of the power have generally met with strong judicial dissent and with much professional disapproval, and experience has demonstrated that the exercise of it has been productive of bad results. Taxes, it is everywhere agreed, can only be imposed for *public* objects, and taxation to aid in building the roads of *private railway companies* is hardly consistent with a proper respect for the inviolability of private property and individual rights. Fraud usually accompanies its exercise, and extravagant indebtedness is the result; and, sooner or later, the power will be denied either by constitutional provision (as in Pennsylvania, Ohio, and Illinois, it already is) or by legislative enactment. It is, perhaps, too late to expect, in view of the line of decisions referred to, that the courts in the states which have already passed upon the question will retrace their steps, and too much to hope that the courts in other states will have the boldness successfully to stem the strong tide of authority, strengthened, as it will be, by temporary popular feeling and insidious corporate influence.

§ 106. The courts concur, with great unanimity, in holding that there is *no implied authority* in municipal corporations to incur debts or borrow money in order to become subscribers to the stock of railway companies, and that such power must be conferred by *express* grant. To become stockholders in private corporations is manifestly foreign to the purposes intended to be subserved by the creation of corporate municipalities, and the practice of bestowing powers of this kind is of recent origin, and hence the rule, that in order to exist it must be specially conferred, and cannot be deduced from the ordinary municipal grants.[1]

[1] Aurora *v.* West, 22 Ind. 88, 508, 1864; Starin *v.* Genoa, 23 N. Y. 439, 1869; Gould *v.* Sterling, *ib.* 439, 456; Achison *v.* Butcher, 3 Kansas, 104, 1865; Burnes *v.* Achison, 2 *ib.* 454; Bank *v.* Rome, 18 N. Y. 38; Bridgeport *v.* Housatonic Railway Co. 15 Conn. 475; Marsh *v.* Fulton Co. 10 Wall. 676, 1870; Cook *v.* Manufacturing Co. 1 Sneed (Tenn.), 698, 1854; Nichol *v.* Nashville, 9 Humph. (Tenn.) 252; City and County of St. Louis *v.* Alexander, 23 Mo. 483, 1856; Jones *v.* Mayor, &c. 25 Geo. 610, 1858; Oevricke *v.* Pittsburg, 7 Am. Law Reg. 725; Duanesburg *v.* Jenkins, 40 Barb. 574; French *v.* Teschemaker, 24 Cal. 518, 1864; People *v.* Mitchell, 35 N. Y. 551, 1866;

Accordingly, where a city was, by charter, specifically authorized to construct wharves, docks, piers, water works, works for lighting the city, &c., and was also authorized, upon certain formalities, to create a debt, this was considered to mean a debt for some of these specified purposes, and not to empower the corporate authorities to issue bonds to aid in the construction of a railroad.[1] So there is no implied power in a municipal corporation to take stock in a *manufacturing company* located in or near the corporation,[2] or to aid or engage in other enterprises, essentially private.[3]

Thompson *v.* Lee County, 3 Wall. 327. "No lawyer doubts that a borough can only subscribe to a railroad when expressly authorized by law." *Black*, C. J., in Sharpless's Case, cited Pennsylvania Railway Co. *v.* Philadelphia, 47 Pa. St. 189. A *railroad* is such a "road" as is embraced in the terms of a charter by which the common council of a city were authorized "to take stock in any chartered company for making roads to said city." Railroad Co. *v.* Evansville, 15 Ind. 395, 1860; Aurora *v.* West, 9 *ib.* 74; *post*, chapter on Contracts. The legislature may, before (Aspinwall *v.* Daviess County, 22 How. 364), if not, indeed, after, the subscription is made, but before it is paid for, annul the proceeding and authorize the municipal corporation to withdraw the subscription and release its right to the stock. People *v.* Coon, 25 Cal. 635. Extent of legislative power, *ante*, Chap. IV.

[1] Lafayette *v.* Cox, 5 Ind. (Port.) 38, 1854. As to rights of bondholders, however, see *post*, Contracts and decisions in the National and State Courts, there cited. Power *in general* to the city council of Charleston, by the charter of 1783, to pass, *inter alia*, "every *other* by-law as shall appear to the city council requisite and necessary for the security, *welfare, and convenience* of said city," was held by the Court of Errors, to authorize the city to subscribe to the stock of railroad companies within or without the state. Copes *v.* Charleston, 10 Rich. (South Car.) Law 491, 1857; see City Council *v.* Baptist Church, 4 Strob. Law, 306, 308, for preamble to the charter of Charleston. There can be little doubt that this is pressing the constructive powers of the corporation to an unwarrantable extent. Construction of special acts or charters held to give power to take stock and issue bonds. Meyer *v.* Muscatine, 1 Wall. 384, 1863; Curtis *v.* Butler County, 24 How. 435; Gelpcke *v.* Dubuque, 1 Wall. 220; City and County of St. Louis *v.* Alexander, 23 Mo. 483; Railroad Company *v.* Otoe County, 1 Dillon, C. C. 338, 1871; Rogers *v.* Burlington, 3 Wall. 654 (compare, Chamberlain *v.* Burlington, 19 Iowa, 395); Fosdick *v.* Perrysburg, 14 Ohio St. 472; Goshorn *v.* County, 1 West Va. 308; Taylor *v.* Newberne, 2 Jones (North Car.), Eq. 141; Caldwell *v.* Justices, 4 *ib.* 323; Veeder *v.* Lima, 19 Wis. 280, 1865. The opinion of *Dixon*, C. J., contains an interesting discussion of the questions presented by that case.

[2] Cook *v.* Manufacturing Co. 1 Sneed (Tenn.), 698, 1854.

[3] Clark *v.* Des Moines, 19 Iowa, 199, 1865; Hanson *v.* Vernon, 27 Iowa, 28; Cooley, Const. Lim. 212. A city corporation cannot subscribe for stock

§ 107. Whether *special authority* to a municipality to borrow money to pay for stock subscribed to a railway company will *impliedly repeal, pro tanto*, existing charter limitations upon the rate of taxation, is a question depending upon construction, and in relation to which the courts have differed. But the strong inclination of the National Supreme Court seems to be in favor of that construction, which restricts such limitations to the exercise of the power of taxation in the ordinary course of municipal action.[1]

§ 108. If the *power* to issue bonds in aid of railway and other like enterprises has not arisen, by reason of an absolute non-compliance with conditions precedent, they are void into whosesoever hands they may come.[2] The power, when it exists, to aid or engage in extra-municipal enterprises, being extraordinary in its nature and burdensome to the citizen, must (at least between all persons except *bona fide* holders of the securities) be strictly pursued according to the terms and

in a *steamship line* without express legislative authority. Pennsylvania Railroad Company *v.* Philadelphia, 47 Pa. St. 189; and since the new constitution of Pennsylvania (Art. XI. Sec. 7, Amendment to Constitution, 1857), the legislature cannot give that power. Where a charter recited its purpose to delegate to the city authorities power to make such ordinances as the "contingencies, or the *local* circumstances," of the corporation might require, and gave "full power and authority to make such assessments on the inhabitants of the city, or those who hold taxable property therein, for the safety, benefit, and advantage of the city, as shall appear to them expedient," the court were of opinion that the city might assess a tax upon the real estate within the corporation for the purpose of constructing a canal "for *manufacturing purposes*, and for the better securing an abundant supply of *water for the city*," and if it could not, yet that it was competent for the legislature, as it did by a subsequent act, to adopt and confirm the action of the city in passing such an ordinance. Frederick *v.* Augusta, 5 Geo. 561, 1848. Aside from the curative act, the correctness of the view taken by the court is by no means clear. *Ante*, p. 92, Sec. 46.

[1] Butz *v.* Muscatine, 8 Wall. 575, 1869. *Contra*, Clark *v.* Davenport, 14 Iowa, 494; Learned *v.* Burlington, 2 Am. Law Reg. (N. S.) 394, and note; Leavenworth *v.* Norton, 1 Kansas, 432; Burnes *v.* Achison, 2 Kansas, 254. And see, Commonwealth *v.* Pittsburg, 34 Pa. St. 496; Amey *v.* Allegheny City, 2 How. (U. S.) 364; Fosdick *v.* Perrysburg, 14 Ohio St. 472.

[2] Marsh *v.* Fulton County, *supra;* Clay *v.* County, 4 Bush (Ky.), 154. See, further, chapter on Contracts, *post*, where the rights of *bona fide* holders of such instruments are considered at length.

conditions of the grant conferring it.[1] Thus, under an act authorizing town officers to borrow money upon the credit of the town, and to pay it over to a railroad corporation, to be expended by it "in grading and constructing a railroad," taking in exchange its stock at par, it is not within the power of municipal officers to make a direct exchange of the bonds of the town, even for an equal nominal amount of stock, as this leaves it in the power of the railroad corporation to sell such bonds at a discount.[2]

[1] In Pennsylvania the doctrine has been adopted, that equity will compel the holder to take what he gave and interest where the bonds were issued in violation of statute; but *quære?* See County *v.* Brinton, 47 Pa. St. 367; Pennsylvania Railroad Company *v.* Philadelphia, *ib.* 193.

[2] Starin *v.* Genoa, 23 N. Y. 439; Gould *v.* Sterling, *ib.* 439. In the case last cited, *Selden*, J., p. 460, remarks: "In the present case, the only authority given [to the town] by the act is to borrow upon the bonds of the town. No express power to sell the bonds is given, and no such power can, I think, be implied. To borrow money, and give a bond or obligation for it, and to sell a bond or obligation for money, are by no means identical transactions. In the one case the money and the bond would, of course, be equal in amount; in the other they might or might not be equal." Whether such a defence would be available against a *bona fide* holder of the bonds was not determined. See Woods *v.* Lawrence County, 1 Black, 386; Moran *v.* Miami County, 2 Black, 722.

CHAPTER VII.

Dissolution of Municipal Corporations.

In England.

§ 109. In England, a municipal corporation may be dissolved, 1. By *an act of parliament*, this being considered a necessary consequence of the omnipotence of that body in all matters of political institution.[1] The *king* may, by his prerogative, *create*, but cannot dissolve or destroy a corporation; may grant privileges, but, when vested, cannot take them away.[2]

It has there often been declared, that a municipal corporation may also be dissolved, 2. By *the loss of an integral part*, or the loss of all, or of the majority of the members of any integral part, without which it cannot transact its business unless the parts that remain have the right to act or to restore the corporate succession.[3]

[1] Co. Litt. 176, note; 2 Kyd, 447; Rex *v.* Amery, 2 Term R. 515; Glover, 408; Angell & Ames, Ch. 22, Sec. 767; 2 Kent's Com. 305; County Commissioners *v.* Cox, 6 Ind. 403; State *v.* Trustees, &c. 5 Ind. 77; *ante*, p. 45.

[2] *Ante*, p. 44, Sec. 15; pp. 46, 47, Sec. 16; Rex *v.* Amery, *supra;* Regents of University *v.* Williams, 9 Gill & Johns. 365, 409, 1838. In this case, *Buchanan*, J., in substance, observes: The crown may create, but cannot, at pleasure, dissolve a corporation, or, without its consent, alter or amend its charter. Parliament may do this; but, restrained by public opinion, it has not undertaken to dissolve any private corporation since the time of Henry VIII. so that the power to do so rests wholly in theory. In 1783 a bill was proposed to remodel the East India Company. Lord Thurlow opposed it as subversive of the law and constitution, and, in strong language, declared it to be "an atrocious violation of private property, which cut every Englishman to the bone."

[3] Willc. on Corp. 325, Chap. VII. This chapter contains an interesting discussion of the question of dissolution, and it would seem that the author, notwithstanding the occasional judgments and the many and broad *dicta* in the books, doubts whether there can be an *actual and total dissolution* of a municipal corporation, either by the loss of an integral part, or by surrender, or by forfeiture. But see 2 Kyd, Ch. 5; Glover, Ch. 20; Angell & Ames, Sec. 769; and particularly Rex *v.* Morris and Rex *v.* Stewart, 3 East, 213; 4

3. By a *surrender of the franchise* of being a corporation to the crown, whose acceptance is necessary; and to be effectual the surrender must be enrolled in chancery. The power to surrender has been much questioned; the argument in favor of it being, that since by royal grant and acceptance a corporation may be created, so by surrender and acceptance it may be annulled. It is admitted, however, that a corporation created or confirmed by parliament or statute cannot dissolve itself by a surrender of its charter or franchise.[1]

4. By *forfeiture of its charter*, through negligence or abuse of its franchise, judicially ascertained by proceedings in *quo warranto* or *scire facias*. This mode of dissolution proceeds upon the doctrine, well settled as to *private* corporations, both in England and in this country, and, perhaps, settled in that country, also, as respects the old municipal corporations when created by royal charter, that there is a tacit or implied condition annexed to the grant of every act or charter of incorporation, that the grantees shall not neglect to use, or misapply the powers granted, and that if they do, the condition is broken upon which the corporation was created, and the corporation thereupon ceases to exist. And in the cases in the

East, 17. In Rex *v.* Passmore, 2 Term R. 241, where the subject was much considered, Lord Kenyon observed, when an integral part of a corporation is gone, without whose existence the functions of the corporation cannot be exercised, and the corporation has no manner of supplying the integral part, the corporation is dissolved as to *certain purposes*. But the king may renovate either with the old or new corporators.

The leading authorities respecting the effect of the *loss of an integral part* are, 1 Rol. Abr. 514; Regina *v.* Bewdley, 1 P. Wms. 207; Banbury Case, 10 Mod. 346; Rex *v.* Tregony, 8 Mod. 129; Colchester *v.* Seaber, 3 Burr. 1870; S. C. 1 Wm. Bl. 591, which, however, is said not to be a case of the loss of an integral part, but of magistrates; Grant, Corp. 305, note; Rex *v.* Passmore, 3 Term R. 241. The foregoing cases are succinctly stated by Mr. Kyd, 2 Corp. Ch. 5. See, also, Mayor, &c. of Colchester *v.* Brooke, 2 Queen's B. 383, and Mr. Justice *Campbell's* learned opinion in Bacon *v.* Robertson, 18 How. (U. S.) 480, 1855; People *v.* Wren, 4 Scam. 275, citing and relying on Colchester *v.* Seaber, *supra;* Smith's Case, 4 Mod. 53; Smith *v.* Smith, 3 Dessaus. (S. C.) 557; Welch *v.* Ste. Genevieve, 1 Dillon C. C. 130; chapters on Corporate Officers and Corporate Meetings, *post.*

[1] Rex *v.* Osbourne, 4 East, 326; Rex *v.* Miller, 6 T. R. 277; Willc. 332, pl. 861; Howard's Case, Hutt. 87; Grant on Corp. 306, 308; Thicknesse *v.* Canal Co. 4 M. & W. 472.

time of Charles II. it was held, that the corporation might forfeit its franchise by reason of the neglect or misconduct of its *officers*.[1]

In the United States.

§ 110. These various modes of dissolution, except the first, are believed by the author to be inapplicable to municipal corporations in this country as they are generally created and constituted. Here it is the *people* of the locality who are erected into a corporation, not for private, but for public, purposes. The corporation is mainly and primarily an instrument of government. The officers do not constitute the corporation, or an integral part of it. The existence of the corporation does not depend upon the existence of officers. The qualified voters or electors have, indeed, the right to select officers, but they are the mere agents or servants of the corporation, and hence the doctrine of a dissolution by the loss of an integral part has, in such cases, no place. If all the people of the defined locality should wholly remove from or desert it, the cor-

[1] 1 Blacks. Com. 485; 2 Kyd, 447; Willc. Chap. VII. 325, *et seq.;* Taylors of Ipswich, 1 Rol. 5; Rex *v.* Grosvenor, 7 Mod. 199; Smith's Case, 4 Mod. 55, 58; S. C. 12 Mod. 17; Skin. 311; 1 Show. 278; Rex *v.* Saunders, 3 East, 119; Mayor, &c. of Lyme *v.* Henley, 2 Cl. & F. 331; Rex *v.* Kent, 13 East, 220; Priestley *v.* Foulds, 2 Scott N. R. 205, 225; Attorney General *v.* Shrewsbury, 6 Beav. 220. The American cases relating to the dissolution of *private* corporations by forfeiture of their charters; what will constitute sufficient ground of forfeiture; and the mode of proceeding to ascertain and enforce the forfeiture, are collected, and the result very clearly and satisfactorily stated, in Angell & Ames on Corporations, Chap. XXII. See, also, 2 Kent Com. 305. Private corporations may lose their legal existence, 1. By the act of the legislature; 2. By the death of all of their members; 3. By a forfeiture of their franchises; and 4. By a surrender of their charter. No other mode of dissolution is anywhere alluded to. Boston Glass Manuf. v. Langdon, 24 Pick. 49, 52, *per Morton,* J.; Commonwealth *v.* Union Ins. Co. 5 Mass. 230, 232; Riddle *v.* Locks and Canals, 7 Mass. 169; School *v.* Canal &c. Co. 9 Ohio, 203; Canal Co. *v.* Railroad Co. 4 Gill & Johns. 1; Vincennes University *v.* Indiana, 14 How. 268.

Mr. Grant, in his work on Corporations, considers it doubtful whether an *information* in the nature of *quo warranto* will lie, in England, against parliamentary or statute corporations, for usurping powers not given, or misusing those conferred (Corp. 307, 308); but in this country, the law as to private corporations is indisputably settled, that in such cases an information may be brought.

poration would, from necessity, be suspended or dormant, or, perhaps, entirely cease; but the mere neglect or mere failure to elect officers will not *dissolve* the corporation, certainly not while the right or capacity to elect remains.[1] In this respect municipal corporations resemble ordinary private corporations, which exist *per se*, and consist of the stockholders, who compose the company. The officers are their agents, or servants, but do not constitute an integral part of their corporation, the failure to elect whom may suspend the functions, but will not dissolve the corporation.[2]

§ 111. Since all of our charters of incorporation come from the legislature,[3] there can be no dissolution of a municipal corporation by a *surrender* of its franchise. The state creates such corporations for *public* ends, and they will and must continue

[1] Willc. Chap. VII. and observations at pp. 325, 326, 327, pl. 852; Colchester *v.* Seaber, 3 Burr. 1866; Colchester *v.* Brooke, 7 Queen's B. 383; Rex *v.* Passmore, 3 Term R. 241; Grant on Corp. 308; Bacon *v.* Robertson, 18 How. 480; Lowber *v.* Mayor, &c. of New York, 5 Abb. 325; Clarke *v.* Rochester, *ib.* 107; Welch *v.* Ste. Genevieve, 1 Dillon, C. C. 130, 1871. That the *failure to elect officers does not dissolve*, while the capacity to elect remains. See, also, Phillips *v.* Wickam, 1 Paige Ch. 59; Commonwealth *v.* Cullen, 1 Harris (Pa.), 133; President *v.* Thompson, 20 Ill. 197; Rose *v.* Turnpike Co. 3 Watts (Pa.), 46; People *v.* Wren, 4 Scam. (Ill.) 275; Brown *v.* Insurance Co. 3 La. An. 177; Welch *v.* Ste. Genevieve, *supra;* Green Township, 9 Watts & S. (Pa.) 28; Vincennes University *v.* Indiana, 14 How. 268; Muscatine Turnverein *v.* Funck, 18 Iowa, 469. In Lea *v.* Hernandez, 10 Texas, 137, 1853, it appeared that a place was incorporated as a town prior to 1848, that in the year just named the legislature passed an act to incorporate the town, and that no election for officers nor any organization was had thereunder for three years and down to the commencement of the action, nor were there any officers *de facto* acting. The court held that the failure to elect officers operated to dissolve the corporation, there being no express provision of the charter to the contrary. But no authorities are cited and no reasons given, and the conclusion that an actual dissolution of the corporation resulted from a failure to elect, is believed to be unsound.

The existence of a municipal corporation is not considered to be interrupted in consequence of a change in the council. Elmendorf *v.* Ewen, N. Y. Leg. Obs. 85; Elmendorf *v.* Mayor, &c. of New York, 25 Wend. 693. Further, see chapters relating to Corporate Officers and Corporate Meetings, *post.*

[2] Angell & Ames on Corp. Sec. 771, and cases there cited; People *v.* Fairbury, 51 Ill. 149, 1869.

[3] *Ante*, p. 52, Sec. 17; p. 62, Sec. 22; p. 71, Sec. 30.

until the legislature annuls or destroys them, or authorizes it to be done. If there could be such a thing as a surrender, it would, from necessity, have to be made to the legislature, and its acceptance would have to be manifested by appropriate legislative action.

§ 112. The doctrine of a *forfeiture* of the right to be a corporation has also, it is believed by the author, no just or proper application to our *municipal* corporations.[1] If they neglect to use powers in which the public or individuals have an interest, and the exercise of such powers be not discretionary, the courts will interfere and compel them to do their duty.[2] On the other hand, acts done beyond the powers granted are void.[3] If private rights are threatened or invaded, the courts will, as hereafter shown, restrain or redress the injury.[4] With what surprise would we hear of a proceeding to forfeit the charter of the city of New York or Chicago because of the misconduct of their officers, or because the common council, as in the famous case against the city of London, were assuming to exercise unauthorized powers by ordaining an oppressive by-law. In short, unless otherwise specially provided by the legislature, the nature and constitution of our municipal corporations, as well as the purposes they are designed to subserve, are such that they can, in the author's judgment, only be dissolved by the consent of the legislature. They may become inert, or dormant, or their functions may be suspended, for want of officers or of inhabitants, but *dissolved* when created by an act of the legislature, and once in existence, they cannot be, by reason of any default, or abuse of the powers conferred, either on the part of the officers or inhabitants of the incorporated place. As they can exist only by legislative sanction, so they cannot be dissolved or cease to exist except by legislative consent.

[1] See Welch *v.* Ste. Genevieve, 1 Dillon, C. C. 130, 1871, *arguendo.*

[2] *Ante,* Chap. V. p. 110, Sec. 62; *post,* chapter on Mandamus.

[3] *Ante,* p. 151, Sec. 55, and notes.

[4] See chapter on Remedies to Prevent, Correct, and Redress Illegal Corporate Acts, *post.*

Effect of Dissolution.

§ 113. At common law, a corporation, of whatever kind, which was wholly dissolved, was considered to be civilly dead; and the *effect* was, that their lands reverted to the grantor or his heirs, and the debts of the corporation, whether owing to or by it, were extinguished. Leases made by the corporation would cease because of the reversion of the lands to the original owners; and, for the same reason, lands given to, or held by, the corporation for charitable purposes would be lost.[1] These inconveniences and results are so disastrous that the English courts, as the more recent cases before cited will show, have doubted and limited, although they may not have overthrown the doctrine that municipal corporations may be *totally* dissolved. These consequences of a dissolution of a corporation attached to *all* corporations, eleemosynary, municipal, and private; and since this doctrine has, in this country, been generally rejected as to private corporations organized for pecuniary profit, and rests upon no foundation in reason or justice, it may, perhaps, be safely affirmed that it would not, on full consideration, be applied to the dissolution of a municipal corporation by an absolute and unconditional repeal of its charter, or (if that may be done) to the case where the charter of such a corporation is forfeited by judicial sentence. Therefore, the leases of a corporation would not be disturbed by its dissolution, nor would their lands held in fee revert, nor would those held in trust for charitable purposes be lost, since equity would supply trustees.[2]

[1] Co. Litt. 13; 1 Lev. 237; Knight *v.* Wells, 1 Lut. 519; Rex *v.* Sanders, 3 East, 119; Attorney General *v.* Gower, 9 Mod. 226; 1 Rol. Abr. 816; Colchester *v.* Seaber, 3 Burr. 1866; Willc. 330, pl. 858; 2 Kyd, 516; Rex *v.* Passmore, 3 Term R. 247; Grant, Corp. 305; Colchester *v.* Brooke, 7 Queen's B. 383; Commonwealth *v.* Roxbury, 9 Gray, 510, note.

[2] *Ante*, p. 81, Sec. 37; p. 93, Sec. 47; chapters on Corporate Boundaries and Property, *post.* Bacon *v.* Robertson, 18 How. (U. S.), 480, 1855; Girard *v.* Philadelphia, 7 Wall. 1, 1868; Mumma *v.* Potomac Company, 8 Pet. 281, 1834; Curran *v.* Arkansas, 15 How. (U. S.) 312; 2 Kent, 307, note; Angell & Ames, Corp. 779 *a*; Coulter *v.* Robertson, 24 Miss. 278; County Commissioners *v.* Cox, 6 Ind. 403; State *v.* Trustees, &c. 5 Ind. 77; Vincennes University *v.* Indiana, 14 How. 268; Owen *v.* Smith, 31 Barb. 641; Commonwealth *v.* Roxbury, 9 Gray, 510, note. The general subject of the *effect of a dissolution of a corporation* is extensively discussed by Mr. Justice

§ 114. As respects the *creditors* of a municipal corporation, their rights are protected from legislative invasion by the Constitution of the United States, and no repeal of a charter of

Campbell, in Bacon *v.* Robertson, *supra*. The case was a bill in chancery by the stockholders of a bank, whose charter had been judicially forfeited, for a distribution of the surplus after the payment of the debts, and the relief was granted. The Supreme Court of the United States seemed to be of opinion that, upon the *general principles of equity jurisprudence, and without statutory aid*, the surplus of the assets of a corporation for pecuniary profit, after the payment of debts and expenses, belonged to the shareholders; that the creditor of such a corporation, dissolved or declared forfeited by judgment upon *quo warranto* or judicial sentence, has, without a statute to that effect, a claim in equity upon the corporate property for the satisfaction of his debt; that lands conveyed to the corporation in fee and for a full price do not revert, and that the stockholder, as to the surplus after paying the debts, stands upon grounds as high and has claims as irresistible as the creditor before had. The usual consequences of a dissolution, as stated by the text writers, if correct, which was doubted, were deemed inapplicable to moneyed or trading corporations.

In the course of his admirable opinion, the learned justice named observed: "The common law of Great Britain was deficient in supplying the instrumentalities for a speedy and just settlement of the affairs of an insolvent corporation whose charter had been forfeited by judicial sentence. The opinion usually expressed as to the effect of such a sentence was unsatisfactory and questioned. There had been instances in Great Britain of the dissolution of public or ecclesiastical corporations by the exertion of public authority, or as a consequence of the death of their members, and parliament and the courts had affirmed, in these instances, that the endowments they had received from the prince or pious founders would revert in such a case. *Stat. de terris Templariorum*, 17 Edw. II.; Dean and Canons of Windsor, Godb. 211; Johnson *v.* Norway, Winch. 37; Owen, 73; 6 Vin. Abr. 280. What was to become of their personal estate, and of their debts and credits, had not been settled in any adjudicated case, and, as was said by Pollexfen in the argument of the *quo warranto* against the city of London, was, perhaps, "*non definitur in jure.*" [See, *ante*, p. 14.] Solicitor Finch, who argued for the crown in that cause, admitted: "I do not find any judgment in a *quo warranto* of a corporation being forfeited." Treby, on behalf of the city, said: "The dissolving a corporation by a judgment in law, as is here sought, I believe is a thing that never came within the compass of any man's imagination till now; no, not so much as the putting of a case. For in all my search (and upon this occasion I have bestowed a great deal of time in searching) I cannot find that it even so much as entered into the conception of any man before; and I am the more confirmed in it because so learned a gentleman as Mr. Solicitor has not cited any one such case wherein it has been (I do not say adjudged, but) even so much as questioned or attempted; and, therefore, I may very boldly call this a case *primæ impressionis.*" The argument of Pollexfen was equally positive.

a municipal corporation can so dissolve it as to impair the obligation of the contract, or, it may probably be safely added, preclude the creditor from recovering his debt.[1]

The power of courts to adjudge a forfeiture so as to dissolve a corporation was affirmed in that case, but the effect of that judgment was not illustrated by any execution, and the courts were relieved from their embarrassment by an act of parliament annulling it. Smith's Case, 4 Mod. 53; Skin. 310; 8 St. Trials, 1042, 1052, 1283. Nor have the discussions since the revolution extended our knowledge upon this intricate subject. The case of Rex *v.* Amery, 2 Durn. & E. 515, has exerted much influence upon text writers. The questions were, whether a judgment of seizure *quosque* upon a default was final, and, if so, whether the king's grant of pardon and restitution would overreach and defeat a charter granting to a new body of men the same liberties, intermediate the seizure and the pardon. The king's bench, relying upon the Year-Book, discovered that it did not support the conclusion drawn from it, and Chief Baron Eyre says that "Lord Coke had adopted the doctrine too hastily." The discussions upon this case show how much the knowledge of the writ of *quo warranto*, as it had been used and applied under the Plantagenets and Tudors, had gone from the memories of courts and lawyers. 4 Durn. & E. 122; Tan. on *Quo War.* 24. In Colchester *v.* Seaber, 3 Burr. 1866, where the suit was upon a bond, and the defence was, that certain facts had occurred to dissolve the corporation, and that the creditor's claim was extinguished on the bond, Lord Mansfield said, "Without an express authority, so strong as not to be gotten over, we ought not to determine so much against reason as that parliament should be obliged to interfere." The question occurs here, Could parliament interfere? And the answer would be, by their authorizing a suit to be brought, notwithstanding the dissolution. These are all cases of municipal corporations where the corporators had no rights in the property of the corporation in severalty."

[1] *Ante*, Chap. IV. *passim;* particularly p. 86, Sec. 41; Cooley, Const. Lim. 290, 292; Curran *v.* Arkansas, 15 How. (U. S.) 312; Bacon *v.* Robertson, *supra;* 2 Kent 307, note; County Commissioners *v.* Cox, 6 Ind. 403; State v. Trustees, 5 Ind. 77; Coulter *v.* Roberson, 24 Miss. 278; Gelpcke *v.* Dubuque, 1 Wall. 175, 1865; Van Hoffman *v.* Quincy, 4 Wall. 535; Welch *v.* Ste. Genevieve, 1 Dillon, C. C. 130; Thompson *v.* Lee County, 3 Wall. 327; Havemeyer *v.* Iowa County, 3 Wall. 294; Butz *v.* Muscatine, 8 Wall. 575; Lansing *v.* Treasurer, &c. 1 Dillon, C. C. 522; Soutter *v.* Madison, 15 Wis. 30; Smith *v.* Appleton, 19 Wis. 468; Blake *v.* Railroad Co. 39 N. H. 435. The dissolution of a private corporation by authorized legislative act, or judicial sentence, does not impair the obligation of a contract any more than the death of a private person impairs the obligation of his contract. This doctrine was based upon two grounds: First, the obligation survives, and the creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of *bona fide* purchasers; second, every creditor is presumed to contract with reference to a possibility of a dissolution of the corporate body. Mumma *v.* Potomac Company

§ 115. The name of an incorporated place may be changed, its boundaries enlarged or diminished, and its mode of government altered, and yet the corporation not be dissolved, but in law remain the same.[1]

§ 116. Where the functions of an old corporation are superseded, or where the corporation, by loss of all its members, or of an integral part, is dissolved as to certain purposes, it may be *revived* by a new charter, and the rights of the old corporation be granted over to the same, or a new set of corporators, who, in such case, take all the rights, and are subject to all the liabilities, of the old corporation, of which it is but a continuation.[2]

(holding that on *sci. fa.* a judgment could not be revived, or costs adjudged, against a corporation legislatively annulled), 8 Pet. (U. S.) 281, 1834. In the case of the town of Port Gibson *v.* Moore, 13 Sm. & Marsh, 157, 1849, it was held, indeed, that the repeal of the charter of an indebted municipal corporation dissolved it; that *such dissolution extinguished* debts to and from the corporation, and that a subsequent act re-incorporating the place did not make it liable for a debt existing anterior to the act repealing its charter. The court overlooked the constitutional provision protecting contracts, and the case as to the effect of a dissolution upon the rights of creditors seems to conflict with those above cited. See further, as to extinguishment of debts by dissolution of corporation: Mallory *v.* Mallett, 6 Jones, Eq. 345; Hopkins *v.* Whitesides, 1 Head (Tenn.), 31; Bank *v.* Lockwood, 2 Harring. (Del.) 8; Robinson *v.* Lane, 19 Geo. 337; Muscatine Turnverein *v.* Funck, 18 Iowa, 469; Owen *v.* Smith, 31 Barb. 641; Welch *v.* Ste. Genevieve, 1 Dillon, C. C. 130.

[1] *Ante*, p. 98, Sec. 52, and cases cited; *post*, Chap. VIII. and see *ante*, Chap. IV., where the extent of the legislative authority over municipal corporations is considered.

[2] Rex *v.* Passmore, 3 Term R. 119, 247; Regina *v.* Bewdley, 1 P. Wms. 207; Colchester *v.* Brooke, 7 Queen's Bench, 383; Colchester *v.* Seaber, 3 Burr. 1866; Grant on Corporations, 304 and note; 2 Kyd, 516. Whether a statute or legislative charter will operate to revive or continue an old, or to create a new and distinct corporation, depends upon the intention of the legislature. *Ante*, Chap. V.; Bellows *v.* Bank, &c. 2 Mason, C. C. 43, *per Story*, J.; Angell & Ames, Sec. 780; Grant on Corporations, 304, 305; Hoffman *v.* Van Nostrand, 42 Barb. 174; Girard *v.* Philadelphia, 7 Wall. 1; Olney *v.* Harvey, 50 Ill. 453, 1869.

CHAPTER VIII.

Corporate Name, Boundaries, and Seal.

Corporate Name.

§ 117. Every corporation must have a name. This is essential to distinguish it from other corporations. In England, before the Municipal Corporations Act of 5 and 6 Will. IV. Chap. LXXVI. 1835,[1] such corporations obtained their name by having it expressed in their charter (whether royal or parliamentary), or by usage or by implication.[2] If a particular name be given to a corporation in its charter, the corporation can no more change it at its pleasure than a man can at pleasure change his baptismal name. If no name be given to a corporation by its charter or by statute, it may obtain one by implication. Where a corporation exists by prescription, it may have more than one name, but the names, to be recognized as valid, must be prescriptive, and cannot be acquired by usage within the time of memory. It has been decided, in England, that a corporation may have one name by prescription and another by grant; but it is said that the same corporation cannot, at the same time, have two different names by different grants, for the name in the last grant will take the place of the other.[3]

§ 118. But the *Municipal Corporations Act*, just mentioned, which changed the corporate constitution of the cities, towns, and boroughs of England and Wales, and reduced them to an

[1] *Ante*, pp. 47–51, and note.

[2] Glover, 52, 53; Willc. 35; Grant, 50; *ante*, p. 60. As to *usage*, see, *ante*, Chap. V. p. 105.

[3] Knight *v.* Wells, 1 Ld. Raym. 80; Physicians *v.* Salmon, 3 Salk. 102; Com. Dig. Franch. F. 9; *per Holt*, 1 Salk. 191; 1 Str. 614; Smith *v.* Railroad Company, 30 Ala. 650, 1857. See, also, All Saints Church *v.* Lovett, 1 Hall (N. Y.), 191; Manufacturing Company *v.* Davis, 14 Johns. 238; Middlesex, &c. *v.* Davis, 3 Md. 133; Trustees *v.* Peaslee, 15 N. H. 317; Society, &c. *v.* Young, 2 N. H. 310.

uniform model, made this provision as the name of the corporation, under the new act: "Said body, or reputed body, corporate shall take and bear the *name* of the mayor, aldermen, and burgesses of such borough, and by that name shall have perpetual succession, and shall be capable, in law, by the council hereinafter mentioned of such borough, to do and suffer all acts which now lawfully they and their successors may do and suffer, by any name or title of incorporation, so far as not altered or annulled by the provisions of this act."[1] It is settled by the decisions under this act that the true or proper corporate name for *boroughs* mentioned in it is "mayor, aldermen, and burgesses of the borough of ———," and (under the interpretation clause, Sec. 142 of the act), for cities, "mayor, aldermen, and citizens of the city of ———."[2] It may also be here observed that the courts have determined that, though this act changed the name and made new and important alterations in the constitution of the corporations, yet that its effect was not in any case to create a *new corporation*, but to continue the old, with all their rights, privileges, and franchises, except so far as inconsistent with the provisions of the act.[3] But the name mentioned in the act would doubtless govern, and by that they would have to sue and be sued.

§ 119. *Charters* granted by legislative enactment, in this country, almost invariably *prescribe the name* of the corporate body thus: "The inhabitants of the city or town of ——— are hereby constituted a body politic and corporate, by the name and style of 'city of ———,' or 'town of ———.'"[4] So the general municipal incorporation acts usually contain a provision to the effect that "cities and towns organized or to be

[1] 5 and 6 Will. IV. Chap. LXXVI. Sec. 6; *ante*, p. 51, and note.

[2] Attorney General *v.* Corporation of Worcester, 2 Phillips, 3; Corporation of Rochester *v.* Lee, 15 Sim. 376; Grant, 342; Rawlinson, 13.

[3] Corporation of Ludlow *v.* Tyler, 7 Car. and P. 537; Attorney General *v.* Wilson, 9 Sim. 30,48; Attorney General *v.* Kerr, 2 Beav. 420, 429; Attorney General *v.* Corporation of Leicester, 9 Beav. 46; Doe, &c. *v.* Norton, 11 M. & W. 913, 928. *Parke*, B., there said, "though the name and style of the corporation, and the mode of electing members were changed, the identity of the body itself was not affected." *Ante*, Chap. VII. Sec. 116.

[4] *Ante*, p. 56, Sec. 19.

organized thereunder, are declared to be bodies politic and corporate, under the name and style of the city of ———, or town of ———, as the case may be," &c. Where such an act authorized any existing town or city to adopt its provisions in place of its special charter, and was silent as to the corporate name after the change was made, it was held that the former name was retained.[1]

§ 120. Where a name is given to a municipal corporation by charter or statute, this cannot be changed by the act of the corporation.[2] But, in this country, general statutes are not unfrequent, authorizing the creation of *quasi* corporations, without making it necessary to designate the name by which a particular district shall be called; in such case it may acquire a *name by reputation*, and sue and be sued by such name.[3]

§ 121. A misnomer, or variation from the precise name of of the corporation, in a *grant* or *obligation* by or to it, is not material, if the identity of the corporation is unmistakable, either from the face of the instrument or from the averments and proof.[4]

[1] Johnson *v.* Indianapolis, 16 Ind. 227, 1861. Corporate name of the city not judicially noticed: *Ib.* *Ante*, p. 57, Sec. 20.

[2] Willcock, 34, 37, 38; Regina *v.* Registrar Joint Stock Company, 10 Q. B. 839. See Episcopal, &c. Society *v.* Episcopal Church, 1 Pick. 372. Change of name does not necessarily involve a change of identity: Girard *v.* Philadelphia, 7 Wall. 1. *Ante*, Chap. VII. Sec. 116.

[3] School District *v.* Blakeslee, 13 Conn. 227, 1839. As to *quasi* corporations, *ante*, pp. 30–32, and note; *post*, chapter on Actions.

[4] Inhabitants *v.* String, 5 Halst. (N. J.) 323, 1829; Kentucky Seminary *v.* Wallace, 15 B. Mon. 35, 1854; New York Conference *v.* Clarkson, 4 Halst. Ch. 541, 1851; Angell & Ames, Sec. 185; Pendleton *v.* Bank of Kentucky, 1 Mon. 177; Medway Cotton Manufacturing Company *v.* Adams, 10 Mass. 360; People *v.* Love, 19 Cal. 676; African Society *v.* Varick, 13 Johns. 38; Woolrich *v.* Forrest, 1 Pa. 115; Bower *v.* State Bank, 5 Ark. 234; Pierce *v.* Somerworth, 10 N. H. 369; Douglas *v.* Branch Bank, &c. 19 Ala. 659.

"The general rule to be collected from the cases is," says Chancellor *Kent*, "that a variation from the precise name of the corporation, when the true name is necessarily to be collected from the instrument, or is shown by proper averments, will not invalidate a grant by or to a corporation, or a contract with it, and the modern cases show an increased liberality on this subject:" 2 Com. 292; approved, St. Louis Hospital *v.* Williams, Administrator, 19 Mo. 609, 1854. "We adopt the more reasonable rule laid down by

§ 122. Where the *intention of the testator* is clear, a *mistake in the name or description* of the object of his bounty will not make the devise void. This general principle is applicable to all corporations, private and public. But the intention must be so clear as to remove all reasonable doubt as to the corporation meant. This rule may be illustrated by a few examples. Thus, a devise to a college by its common name, though not the true corporate name, is good.[1] So, where the devisees were called by their popular name, "*The South Parish in Sutton*," their legal name being, "The *First* Parish in Sutton," the devise was sustained.[2] So, also, the "Mayor, Jurats, and Commonalty of the Town of Rye," that being the corporate name, were held entitled to lands by a devise to "The Right Worshipful the Mayor, Jurats, and *Town Council* of the Town of Rye." although there was no town council in the town, and although the court admitted the proposition of counsel against the will, that if the "intent appears to give to a *part* of the corporation, although that intent fails of effect, the *whole* corporation cannot take."[3] So, also, a devise to the Mayor, *Chamberlain*, and *Governors*, is valid to a corporation whose true name is Mayor, *Citizens*, and *Commonalty*.[4] So, a legacy may

Mr. *Kyd* (Corp. Vol. I. pp. 286, 288), that the variance must be materially different, in substance, to injure:" *Per Curiam*, People *v.* Runkle, 9 Johns. 147, 157.

"I take the law of the present day to be, that a departure from the strict style of the corporation will not avoid its contracts, if it substantially appear that the particular corporation was intended, and that a latent ambiguity may, under proper averments, be explained by parol evidence, in this as in other cases, to show the intention:" *Per Gibson*, J., in President, &c. *v.* Myers, 6 Serg. & Rawle, 12; S. P. Milford, &c. Company *v.* Brush, 10 Ohio, 111.

When an act of parliament makes a grant to a corporation, it takes effect though the true corporate name be not used, provided the corporation intended be sufficiently identified or described: 1 Kyd, 256; Chancellor of Oxford's Case, 10 Co. 44, 57 *b*.

[1] Chancellor of Oxford's Case, 10 Co. 87 *b*.

[2] First Parish in Sutton *v.* Cole, 3 Pick. 232, 1825, and cases there cited.

[3] Attorney General *v.* Mayor of Rye, 7 Taunton, 546; 2 Eng. Com. Law, 213, 1817.

[4] Owen, 35 (14 Eliz.). "The devise held good by *Dyer*, *Weston*, and *Manwood*, for it shall be taken according to the intent of the devisor." See, also, Connden *v.* Clerke, Hobart, 32; Croydon Hospital *v.* Farley, 6 Taunton,

be given to a corporation either by its corporate name or by a description which clearly distinguishes and identifies the legatee.[1]

§ 123. Where the name of the corporation is expressly defined by charter or statute, it is usually provided in terms that by *such* name it may *sue and be sued.* In such case the true corporate name should be used both in suits by and against the corporation. A name in a grant or obligation to or by a corporation may be sufficient to enable the corporation to enjoy or to make it liable, which would not be sufficient in an action by or against it.[2] If the name of a corporation is lawfully changed, not the identity of the corporation itself, suit should, in general, unless provision be otherwise made, be in the new name.[3] If a note, bond, or other promise be made *to*

467; 1 English Common Law, 457, 1816, where *Gibbs*, C. J., justly condemns the absurd nicety of many of the decisions from the reign of Edward VI. to the end of James I. on the subject of the names and description of corporate bodies.

[1] New York Institute *v.* How, 10 N. Y. (6 Seld.) 84, 1854. In this case the plaintiff, whose corporate name was, "The New York Institution for the Blind," was decided to be entitled to a legacy given to the "Trustees of the Institution for the Maintenance and Instruction of the Indigent Blind," there being no other institution in the city of New York for the blind. See, also, Vansant *v.* Roberts, 3 Md. 119; Preachers' Aid Society, 45 Maine, 552; Chapin *v.* School District, &c. 35 N. H. 445; Minot *v.* Boston Asylum, 7 Met. 416. Parol evidence may, in proper cases, be received to identify the corporation intended. Trustees *v.* Peaslee, 15 N. H. 317; Bodman *v.* American Tract Society, 9 Allen, 447.

[2] Cambridge University *v.* Crofts, 10 Mod. 208; 1 Kyd, 253; Willc. 37; Brittain *v.* Newland, 2 Dev. & Bat. (North Car.) 363; Insane Asylum *v.* Higgins, 15 Ill. 185; Berks Co. &c. *v.* Myers, 6 Serg. & Rawle (Pa.), 12; Clark *v.* Potter Co. 1 Parr (Pa.), 163; Porter *v.* Blakely, 1 Root (Conn.), 440; Kentucky Seminary *v.* Wallace. 15 B. Mon. 35; Romeo *v.* Chapman, 2 Mich. 179.

[3] Mayor, &c. of Colchester, 3 Burr. 1866; Regina *v.* Ipswich, 2 Ld. Raym. 1232, 1238; Angell & Ames, Sec. 644; Glover, 63. Mr. Kyd says: "Where a corporation becomes liable to any duty, and then its name is changed, the *writ* brought against it should be in the new name." 1 Corp. 288. On a merger, by statute, of a *town* into a *city* corporation, it was provided that all of the books, papers, moneys, and effects of the former should vest in the latter. Held, that a suit on a bond made to a town before the transfer could not, afterwards, be instituted in the name of the town, but should be brought in the corporate name of the city. Fort Wayne *v.* Jackson, 7 Blackf. (Ind.) 36, 1843.

a corporation, by a name differing from the corporate name, the corporation may sue in its true name, and allege that it is the party to whom the promise or obligation was made.[1]

Corporate Boundaries.

§ 124. Since the leading object of an American municipal corporation is to invest the inhabitants of a defined locality or place with a corporate existence chiefly for the purposes of local government, it is obvious that the *geographical limits* or boundaries of the corporation *ought to be defined and certain.* These boundaries are usually described in the charter or constituent act, or a method is prescribed therein, by which they may be ascertained and settled. Because residence within the corporation confers rights and imposes duties upon the residents, and the local jurisdiction of the incorporated place is, in most cases, confined to the limits of the corporation, it is necessary that these limits be definitely fixed.[2] They are

[1] 10 Co. 125 *b*; 1 Kyd, 287; African Society *v.* Varick, 13 Johns. 38, 1816; Trustees *v.* Reneau, 2 Swan (Tenn.), 94, 1852; Fort Wayne *v.* Jackson, 7 Blackf. (Ind.) 36, 1843. An allegation that the defendants acknowledged themselves to be bound unto the *plaintiffs, by the description*, &c., is equivalent to such an averment. 13 Johns. 38, *supra.*

[2] Cutting *v.* Stone, 7 Vt. 471; Gray *v.* Sheldon, 8 *ib.* 402; Pierce *v.* Carpenter, 10 *ib.* 480. As to *boundaries* generally, and construction of acts relating thereto, see Hamilton *v.* McNeil, 13 Gratt. (Va.) 389; Raab *v.* Maryland, 7 Md. 483; Green *v.* Cheek, 5 Ind. 105; People *v.* Carpenter, 24 N. Y. 86; Elmendorf *v.* Mayor, &c. 25 Wend. 693.

The following cases relate to questions which have arisen with respect to places *bounded on rivers:* An act extending the bounds of a town over the adjacent navigable waters does not thereby grant to the town the land covered by the water, and consequently confers no right to make rules to regulate the use of such land, although such an act will bring the territory within the limits of the town for the purposes of civil and criminal jurisdiction: Palmer *v.* Hicks, 6 Johns. 133, 1810.

In *New Hampshire,* towns bounded by or on rivers not navigable, or by lines up or down the river, extend to the *center of the river*, and this principle is held to apply to the great streams, the Connecticut and the Merrimack: State *v.* Canterbury, 8 Fost. (N. H.) 195, 1854; State *v.* Gilmanton, 14 N. H. 467. See, also, Cold Springs, &c. *v.* Tolland, 9 Cush. 492.

In *Connecticut*, towns bounded on rivers, in some instances, take the land on each side of the river, in which case the whole river is within the jurisdiction of the town. In other instances, where towns are bounded *on rivers,* the jurisdiction thereof is construed, without any express provision

established by legislative authority. The power to incorporate a place necessarily includes the power to fix and change its boundaries.

§ 125. There *cannot be*, at the same time, *within the same territory, two distinct municipal corporations*, exercising the same powers, jurisdictions, and privileges.[1]

to that effect, and in virtue of ancient usage to that effect, to extend to the center of the stream. Opposite towns have each political and civil jurisdiction to the center, though the charter limits extend only to the stream, or margin or channel thereof: Pratt *v.* State (assault on officer on the river Connecticut), 5 Conn. 388, 1824; Hayden *v.* Noyes (oyster fishery on the Connecticut river), *ib.* 391, 395. *Hosmer*, C. J. (*ib.* 395), remarks: "Every part of the Connecticut river, so far as it relates to jurisdiction, is within some town in the state; or these waters would be a sanctuary for debtors and criminals. Such has been the invariable usage."

The jurisdiction of *Brooklyn*, for police purposes, extends to *low water line*, whether formed naturally or artificially: Furman Street, 17 Wend. 649, 661. See Udall *v.* Trustees, 19 Johns. 175, *ib.* 179, as to boundary of *New York city*. By statute, the bounds of *Albany* extend to the middle of the Hudson river: 9 Wend. 602. Eastern boundary line of *St. Louis* was defined by the charter to be the Mississippi river, and it was held to extend to the middle of the stream, and not simply to the bank: Jones *v.* Soulard, 24 How. 41, 1860.

Where the riparian proprietor only owns to high water mark, and all below belongs to the state, a city cannot tax lots covered by water beyond high water mark: State *v.* Jersey City, 1 Dutch. (N. J.) 525; *ib.* 530.

Statute duty as to *bridges* of adjacent towns bounding on a river running between them: Brookline *v.* Westminster, 4 Vt. 224; Granby *v.* Thurston, 23 Conn. 416.

The same construction that is given to grants is given to statutes which prescribe the boundaries of incorporated territories. Thus, where a stream not navigable is made the boundary, the center of the stream is the true line: Cold Springs, &c. *v.* Tolland, 9 Cush. 492, 1852 (action for defective bridge); Inhabitants of Ipwick, 13 Pick. 431.

[1] Willc. on Corp. 27; Patterson *v.* Society, &c. 4 Zabriskie (N. J.), 385, 399, *per Green*, C. J., 1854; Rex *v.* Passmore, 3 Term R. 243; Rex *v.* Amery, 2 Bro. P. C. 336; Grant on Corp. 18. Where the boundary line of a corporation was vague and indefinite, the practical interpretation which had been given to the statute by the citizens of the disputed district in exercising municipal privileges, such as voting, &c. was adopted by the court: Milne *v.* Mayor, &c. 13 La. 69, 1838. See, also, Hamilton *v.* McNeil, 13 Gratt. (Va.) 389, 1856. Boundaries may be defined by long use, confirmed by a legislative recognition: People *v.* Farnham, 35 Ill. 562. If a dwelling house is divided by the boundary line between two towns, that portion of the house which the occupant mainly and substantially makes his home (as by sleeping, eating, &c.) fixes his residence, and he cannot elect to reside and be taxed in the other town: Cheenery *v.* Waltham, 8 Cush. 327, 15 "

§ 126. Not only may the legislature originally fix the limits of the corporation, but *it may subsequently annex*, or authorize the annexation of, contiguous or other territory, and this without the consent, and even against the remonstrance, of the majority of the persons residing in the corporation or on the annexed territory. And it is no constitutional objection to the exercise of this power of compulsory annexation, that the property thus brought within the corporate limits will be subject to taxation to discharge a pre-existing municipal indebtedness, since this is a matter which, in the absence of special constitutional restriction, belongs wholly to the legislature to determine.[1]

[1] Blanchard *v.* Bissell, 11 Ohio St. 96, 1860, defining *contiguity* and construing statute authorizing county commissioners to annex; following and approving Powers *v.* Wood County, 8 Ohio St. 285, 1858. See, also, Layton *v.* New Orleans, 12 La. An. 515, 1857; Arnoult *v.* New Orleans, 11 *ib.* 54; Cheany *v.* Hooser, 9 B. Mon. 330; Gorham *v.* Springfield, 21 Maine, 59; Morford *v.* Unger, 8 Iowa, 82, 1859; St. Louis *v.* Russell, 9 Mo. 503, 1845; St. Louis *v.* Allen, 13 Mo. 400, 1850; Railroad Company *v.* Spearman, 12 Iowa, 112; Wade *v.* Richmond, 18 Gratt. (Va.) 583, 1868; Norris *v.* Mayor, &c. 1 Swan (Tenn.), 164; Elston *v.* Crawfordsville, 20 Ind. 272; Edmunds *v.* Gookins, *ib.* 477; Girard *v.* Philadelphia, 7 Wall. 1, 1868. "It would require," says *Swan*, J., in Powers *v.* Wood County, 8 Ohio St. 285, 290, "a very artificial and unsound mode of reasoning to hold that territory could not be annexed to a town which owed debts, until the owners of such territory were paid a compensation in money for a proportional part of such debts, on the ground that the property annexed was condemned for public use. It is not to be presumed that a municipal corporation has contracted a debt without being correspondingly benefited."

It is held in Pennsylvania that, under the terms of the act of the legislature authorizing the incorporation of villages, the boundaries cannot be extended so as to include a large body of farm lands; but the district to be incorporated should be restricted by the courts in which the proceeding is had, so as to include no more than the village itself and its proper territory: Borough of Little Meadows, 35 Pa. St. 335, 1860; Devore's Appeal, 56 Pa. St. 163; Blooming Valley, *ib.* 66; and see chapter on Taxation, *post.*

In Indiana, under act of June 18, 1852, lots adjoining a city, which are laid off, platted, and recorded, may be included within the city limits by resolution of the common council. Contiguous territory not thus laid off, &c. can only be annexed by petition to the board of *county* commissioners: Jeffersonville *v.* Weems, 5 Ind. (Porter) 547, 1854.

Effect of extension of corporate limits on *homestead right*, where different provisions are made for country and town homesteads: Taylor *v.* Boulware, 17 Texas, 74; Finley *v.* Dietrick, 12 Iowa, 516.

§ 127. In connection with the power of the legislature to create corporations and determine their extent, reference may be made to the *division of towns or public corporations* by legislative act or authority. There is no restriction on the general power, unless it be found in the constitution of the state.[1] In case of division, the legislature may, as we have already seen, apportion the burden between the two, and determine the proportion to be borne by each.[2] In Connecticut, "the legislature," says the Supreme Court, "have immemorially exercised the power of dividing towns at its pleasure, and, upon such division, apportioning the common property and common burdens in such manner as to it shall seem reasonable and equitable."[3] Accordingly, it may impose on one town, upon such division, the entire expense of erecting and maintaining a bridge across a river which is the dividing line between the two towns.[4]

§ 128. On the *division* of a town or public corporation possessing corporate property, into two separate towns or com-

Recording town plats: Bemis *v.* Becker, 1 Kansas, 226; Mason *v.* Pitt, 21 Mo. 391; Strong *v.* Darling, 9 Ohio, 201.

As to taxation, for general municipal purposes, of *rural property* within corporate limits and the restrictions on the right, see chapter on Taxation, *post.*

[1] *Ante,* Chap. IV. p. 71, Sec. 30; p. 80, Sec. 36.

[2] *Ante,* pp. 80, 81, 88; Londonderry *v.* Derry, 8 N. H. 320, 1836; Bristol *v.* New Chester, 3 N. H. 532; Sill *v.* Corning, 15 N. Y. 297; People *v.* Draper, *ib.* 532; Smith *v.* Adrian, 1 Mich. 495; Waring *v.* Mobile, 24 Ala. 701; Mayor *v.* State, 15 Md. 376; Love *v.* Schenck, 12 Ire. Law, 304, 1851; Love *v.* Ramsour, *ib.* 328, 1855; Olney *v.* Harvey, 50 Ill. 453; Dunsmore's Appeal, 52 Pa. St. 374; County Court *v.* County Court, 3 Bush (Ky.), 93. And see, *ante,* Chap. IV. for a general view of the extent of the legislative authority over public and municipal corporations and their rights, liabilities, property, and contracts; and Chap. VII. as to the dissolution of municipal corporations and its effect upon their creditors and property.

[3] Granby *v.* Thurston, 23 Conn. 416, 419, *per Waite,* C. J.; Willimantic Society *v.* School Society (division of school societies and funds), 14 Conn. 457; Hartford Bridge Company *v.* East Hartford (ferry franchise), 16 Conn. 149; affirmed, 10 How. (U. S.) 511, 541. Legislature cannot control an educational fund raised by individual bounty and not by taxation: Plymouth *v.* Jackson, 15 Pa. St. 44. See, also, Montpelier *v.* East Montpelier, 27 Vt. 704; 29 *ib.* 12. *Ante,* pp. 81, 93, 98, Sec. 52; p. 159, Sec. 115.

[4] Granby *v.* Thurston, *supra. Ante,* p. 90, Sec. 43.

munities, *each*, in the absence of a different provision by the legislature, was considered by the Supreme Court of New York to be *entitled to hold* in severalty *the public property* which fell within its limits.[1] In Connecticut, it is declared to be "well settled that when part of the inhabitants and territory of an older town are erected into a new corporation, the old town retains all of the property, rights, and privileges formerly belonging to it, and is subject to all its former duties and liabilities, at least as it regards property which has no fixed location in the new town, as lands, buildings, &c.;" accordingly, "upon the division of Hartford, no part of the ferry franchise would pass to the new town of East Hartford, except by virtue of a legal provision to that effect."[2] So, in Massachusetts, it has been held that if a new corporation is created out of part of the territory of an old corporation, or if part of its territory and inhabitants is annexed to another corporation, unless some provision is made in the act respecting the property and existing liabilities of the old corporation, the latter will be entitled to all the property, and be solely answerable for all the liabilities.[3]

[1] North Hempstead *v.* Hempstead, 2 Wend. 109, 1828. "Suppose," says *Savage*, C. J., delivering the opinion of the court in this case, "the state to be divided into two states, without some special agreement, each would own the public property within its limits. So of counties — the public buildings remain the property of the old county; yet public buildings are as much public property as public lands. So as to the plains, meadows, and marshes which are the subject of this suit. A bill filed by a new county for the partition of the gaol and court house, which had been common property, would be the same in principle as the bill in this suit. Would not such a suit be considered preposterous? Suppose a religious corporation, possessed of a church and parsonage; it becomes expedient to erect part into a new corporation; would not the old corporation retain the property, unless an agreement was made as to the partition of it?" 2 Wend. 109, 135. Incorporation of part of a *town* into a *city*, held not to divest the title of the town to a tract of land owned by it in fee simple, "in trust, for the use of the town, forever:" Milwaukee *v.* Milwaukee, 12 Wis. 93.

[2] *Per Church*, J., in Hartford Bridge *v.* East Hartford, 16 Conn. 149, 171, 1844; affirmed by Supreme Court of the United States, 10 How. (U. S.) 511, 541. Approving Windham *v.* Portland, 4 Mass. 384; Hampshire *v.* Franklin, 16 Mass. 76; North Hempstead *v.* Hempstead, 2 Wend. 109. *Ante*, p. 24.

[3] Windham *v.* Portland, 4 Mass. 384, 1808; Richards *v.* Daggett, 4 *ib.* 539; Hampshire *v.* Franklin, 16 Mass. 76, 1819; Richland County *v.* Lawrence, 12

§ 129. But upon the division of the old corporation, and the creation of a new corporation out of part of its inhabitants and territory, or upon the annexation of part to another corporation, the *legislature may provide* for an *equitable appropriation or division* of the property, and impose upon the new corporation, or upon the people and territory thus disannexed, the obligation to pay an equitable proportion of the corporate debts.[1] The charters and constituent acts of public and

Ill. 1, 1850; Blackstone *v.* Taft, 4 Gray, 250, 1855; North Yarmouth *v.* Skillings, 45 Maine, 133, 142, 1858; Cobb *v.* Kingman, 15 Mass. 197; Minot *v.* Curtis, 7 Mass. 441, 445. Opinion of Supreme Judges, 6 Cush. 575; *ib.* 578.

[1] Gorham *v.* Springfield, 21 Maine, 61; North Yarmouth *v.* Skillings, 45 Maine, 133, 1858; Brewster *v.* Harwich, 4 Mass. 278; *ib.* 315; *ib.* 384; Harrison *v.* Bridgton, 16 Mass. 16; *ib.* 76, 1819; Lakin *v.* Ames, 10 Cush. 198, 1852. See School District *v.* Richardson, 23 Pick. 62, 1839, as to the effect in Massachusetts upon the title to property of the abolition of old *school* districts and the formation of new ones; followed by School District *v.* Tapley, 1 Allen, 49; but a *dictum* therein questioned by *Hoar*, J. Simmons *v.* Nahant, 3 Allen, 316, as to necessity of a deed of conveyance for real estate. Tileson *v.* Newman, 23 Vt. 421; Richards *v.* Daggett, 4 Mass. 534; Waldron *v.* Lee, 5 Pick, 323. In Pennsylvania it was held that, on a division of a township, each fraction remains liable for the whole debt due by the old township; if one pays the whole amount, it lays the foundation for contribution: Plunkett Township *v.* Crawford, 27 Pa. St. 107, 1856. See New London *v.* Montville, 1 Root (Conn.), 184. As to right to collect taxes on such division, see Barnett Township *v.* Jefferson County, 9 Watts, 166; Devor *v.* McClintock, 9 Watts & S. 80.

As to support of *poor* in case of division: North Whitehall *v.* South Whitehall, 3 Serg. & Rawle, 117; Overseers, &c. *v.* Overseers, &c. 2 *ib.* 422; Stillwater *v.* Green, 4 Halst. (N. J.) 59.

Where there has been an *insufficient legal division* and organization of a new district, this may be afterwards *ratified* and made binding: Sawyer *v.* Williams, 25 Vt. 311; Pierce *v.* Carpenter, 10 Vt. 480; Alden *v.* Rounsville, 7 Met. 219.

The *mode of proceeding*, under the statute of New York, in the division of old and the erection of new towns, the *directory* nature of the statute as to mode of proceeding, and the presumptions in favor of the regularity of the proceedings, are clearly set forth in the case of The People *v.* Carpenter, 24 N. Y. 86.

As illustrating the *directory* nature of such statutes, see Elmendorf *v.* Mayor, 25 Wend, 693; Striker *v.* Kelly, 7 Hill (N. Y.), 9. But an agreement in such division, transcending the powers of the officers who make it, is not binding on the town: Overseers *v.* Same, 18 Johns. 382. Effect of erection of a *new* out of a portion of an old county on the *terms* of officers who respectively *reside* in the new and old portions, see People *v.* Morrell, 21 Wend. 563, 1839, and authorities cited by *Cowen*, J., p. 580. County

municipal corporations are not, as we have before seen, contracts, and they may be changed at the pleasure of the legislature, subject only to the restraints of special constitutional provisions, if any there be. And it is an ordinary exercise of the legislative dominion over such corporations to provide for their enlargement or division; and, incidental to this, to apportion their property and to direct the manner in which their debts or liabilities shall be met, and by whom. The opinion has been expressed that the partition of the property must be made at *the time* of the division of, or change in, the corporation, since otherwise the old corporation becomes, under the rule just before stated, the sole owner of the property, and hence cannot be deprived of it by a *subsequent* act of the legislature.[1] But, in the absence of special constitutional limitations upon the legislature, this view cannot, perhaps, be maintained, as it is inconsistent with the necessary supremacy of the legislature over all its corporate and unincorporate bodies, divisions and parts, and with several well considered adjudications.[2]

Commissioners must, by law, reside in the county, and on the erection of a new county in which their residences are included, they become *residents* of the *new* county and non-residents of the old county, and cannot legally act for it, unless they remove within it; though if they continue to act without such removal their acts are valid, being officers *de facto:* State *v.* Hartshorn, 17 Ohio, 135; State *v.* Jacobs, *ib.* 143.

[1] Hampshire *v.* Franklin, 16 Mass. 76; Windham *v.* Portland, 4 *ib.* 390; Bowdoinham *v.* Richmond, 6 Greenl. (Maine) 112, holding that subsequent legislation could not change the apportionment of the debts between an old town and one created from it, since such an apportionment was in the nature of a contract. But see, *ante,* Chap. IV. pp. 85, 91.

[2] Layton *v.* New Orleans, 12 La. An. 515, 1857, cited, *ante,* p. 80, Sec. 36; Dunsmore's Appeal, 52 Pa. St. 374. In this case, one borough was divided into four, and the legislature was held to have the power afterwards to provide for an equitable adjustment of the indebtedness among them all, by commissioners to be appointed by a designated court, and from whose determination no appeal was allowed. As to extent of legislative control over public and municipal corporations and their rights, liabilities, property, and contracts, see, *ante,* Chap. IV. and cases there cited; Cooley, Const. Lim. 193, 231, 232; *post,* chapter on Taxation.

Corporate Seal.

§ 130. The charters of municipal corporations usually contain a clause authorizing them to have and use a *common seal*, and to alter the same at pleasure. Without an express grant it is, however, incident to every corporation to adopt and use a corporate seal. The essential importance which the common law anciently attached to seals, and the modern relaxation of the rule, are well known. Respecting seals, the same general principles apply to private and to municipal corporations. Thus, a corporation of the latter class would doubtless be bound equally with a private corporation by any seal which has been *authoritatively affixed* to an instrument requiring it, though it be not the seal regularly adopted.[1] On the other hand, it would not be bound by the affixing of either the regular or temporary seal by a person not legally and duly authorized.[2] So, under the modern doctrine, a corporation can do an act *in pais* by an attorney in fact, and such attorney need not necessarily be appointed under seal.[3]

§ 131. The *seal* of a private corporation attached to an instrument *does not prove its own authenticity;* but it should be shown by evidence *aliunde* to be really the seal of the corporation.[4] The same doctrine is, probably, applicable to the seal

[1] Bank, &c. *v.* Railroad Company, 30 Vt. 159, 1858, *per Redfield,* C. J.; Tenney *v.* Lumber Company, 43 N. H. 343; Mill Dam Foundry *v.* Hovey, 21 Pick. 417; Porter *v.* Railroad Company, 37 Maine, 349; Angell & Ames, Corp, Sec. 217; Phillips *v.* Coffee, 17 Ill. 154; Stebbins *v.* Merritt, 10 Cush. 27; City Council *v.* Moorehead, 2 Rich. Law, 430; Grant on Corp. 59, and cases, and note author's opinion and his doubt as to the existence of any *common law* right to *change* the common seal. An impression of a corporate seal stamped upon and into the substance of the paper containing the instrument is sufficient, without wafer or wax: Hendee *v.* Pinkerton, 14 Allen, 381.

[2] Koehler *v.* Iron Company, 2 Black, 715, 1862; Bank of Inland *v.* Evans, 33 Eng. Law and Eq. 23.

[3] Curry *v.* Bank, 8 Porter (Ala.), 361, 1839; Lathrop *v.* Bank, 8 Dana, 114; Abby *v.* Billups, 35 Miss. 618.

[4] Den *v.* Vreelandt, 2 Halst. (N. J.) 352, 1800; Gilbert Ev. 19; Jackson *v.* Pratt, 10 Johns. 381; Moises *v.* Thompson, 8 Term R. 303; City Council *v.* Moorehead, 3 Rich. (South Car.) Law, 430; Foster *v.* Shaw, 7 Serg. & Rawle, 163; *ib.* 318; Mann *v.* Pentz, 2 Sandf. Ch. 257.

of a municipal corporation, except where changed by charter or statute, although it seems that it is usual in England to allow deeds and other instruments relating to real estate to go to the jury when authenticated by the corporate seals of London, Edinburgh, or Dublin — these being corporations of great antiquity, or recognized by the legislature.[1] The corporate seal attached to an instrument attested by the signatures of the proper officers, is *prima facie* evidence that it was lawfully placed there, and that the instrument is the act of the corporation.[2]

§ 132. The modern rule is that corporations may be bound by *contracts not under seal*, and the circumstances under which they will be bound have been stated by *Story*, J., in terms which have been approved by the courts of nearly every state in the Union. "Wherever a corporation is acting within the scope of the legitimate purposes of its institution, all *parol* contracts made by its authorized agents are *express* promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise *implied* promises, for the enforcement of which an action lies."[3]

[1] *Per Kinsey*, C. J., Den *v.* Vreelandt, 2 Halst. (N. J.) 352.

[2] Levering *v.* Mayor, 7 Humph. (Tenn.) 553, 1847; Abbott, Corp. Digest, Tit. *Seal*, p. 725, Sec. 31, and the many cases there cited; Benedict *v.* Denton, Walk. Ch. 336; Musser *v.* Johnson, 42 Mo. 74.

[3] Bank of Columbia *v.* Patterson, 7 Cranch (U. S.), 299, 306, 1813; Bank *v.* Wister, 2 Pet. 318; Davenport *v.* Insurance Company, 17 Iowa, 276; Ring *v.* Johnson County, 6 Iowa, 265. See, further, chapters on Contracts and Property, *post*. Corporate seal affixed to the note of the corporation makes it a specialty, having in this respect the same effect as the seal of a natural person: Clarke *v.* Farmers & Co. 15 Wend. 256; *ib.* 265; Benoist *v.* Carondolet, 8 Mo. 250; Sturtevant *v.* Alton, 3 McLean, 393. Lease held void for want of the corporate seal: Kinzie *v.* Chicago, 2 Scam. (Ill.) 188. But otherwise of an authorized agreement by an agent of a corporation to sell lands: Legrand *v.* The College, 5 Munf. (Va.) 324; or authorized assignment of a lease: Sanford *v.* Tremlett, 42 Mo. 384. Corporate seal to conveyance by county commissioners: Bestor *v.* Powers, 2 Gilm. (Ill.) 126.

CHAPTER IX.

Municipal Elections and Officers.

§ 133. In considering the Creation and Constitution of Municipal Corporations, we have now reached, in its order, the subject of Municipal Elections and Officers. It will be treated under the following heads:—

1. Municipal Popular Elections—Secs. 134–138.
2. Special Tribunal to Determine Election Contests for Municipal Offices—Secs. 139–144.
3. Power to Create and Appoint Municipal Officers—Secs. 145–152.
4. Oath and Official Bond—Secs. 153–155.
5. Duration of Official Term—Secs. 156–160.
6. Vacancies in Municipal Offices—Sec. 161.
7. Refusal to Serve in Office—Sec. 162.
8. Resignation of Municipal Officers—Secs. 163–167.
9. Compensation of Municipal Officers—Secs. 168–173.
10. Liability of the Corporation to the Officer—Sec. 174.
11. Liability of the Officer to the Corporation and to Others—Sec. 175.
12. Amotion and Disfranchisement—Secs. 177–194.

Municipal Popular Elections.

§ 134. Elections by the people, with exceptions in a few states, are by folded or secret ballot, and not open or *viva voce*.[1] The qualifications of electors or voters are fixed by the constitution and laws, and cannot be changed by any ordinance

[1] Cooley, Const. Lim. Chap. XVII. 598, where the subject of Popular Elections, the Right to Participate Therein, the Conditions Necessary to the Exercise of the Right, the Manner of Voting, the Conduct and Sufficiency of Elections are satisfactorily presented; and the rules and doctrines deduced from the cases are, in general, applicable to popular municipal elections.

or act of the corporation.[1] Residence for a certain period within the municipality is almost invariably required in express terms, as one of the qualifications of the right to vote at elections therein, and as one of the conditions of eligibility to hold a municipal office. Non-residents of the corporation have, however, been held competent to be elected to office when residence was not expressly required, but the decisions cannot, perhaps, be said to conclude the point,[2] and, if ex-

[1] Petty *v.* Tooker, 21 N. Y. 267; Commonwealth *v.* Woelper, 3 Serg. & Rawle, 29; People *v.* Phillips, 1 Denio, 388; Rex *v.* Spencer, 3 Burr. 1827; Rex *v.* Mayor of Weymouth, 7 Mod. 371; Newling *v.* Francis, 3 Term R. 189; Rex *v.* Chitty, 5 Ad. & E. 609; Rex *v.* Bumstead, 2 B. & Ad. 699.

[2] Municipal officers may be elected from non-residents of the corporation when there is no statute or constitution prohibiting it, particularly when the office to be filled is one requiring professional skill, and not representative or legislative in its character: State *v.* Blanchard (city surveyor), 6 La. An. 515, 1851. The conclusion was reached with hesitation, but the whole court concurred: *Ib.* So in The State *v.* Swearingen, 12 Geo. 23, 1852, it was decided where the charter of the town provided "for the election of city officers by the people of the city qualified to vote," and was silent as to requiring the officers to be residents, that a person might legally be elected and qualified who was not a resident of the place. Residence as a qualification for municipal office: See Commonwealth *v.* Jones, 12 Pa. St. 365. *Residents*, who are: Cohen *v.* Wigfall, 8 Rich. Law, 237; 2 *ib.* 489; Goldersleeve *v.* Alexander, 2 Speer (South Car.), 298. In England, by the Municipal Corporations Act (Sec. 9), inhabitant householders resident within the borough, or within seven miles of the borough, and rated to the relief of the poor, are made burgesses or citizens. Before that act was passed, residence in the freeman or citizen was sometimes required, to render him eligible to office, although non-residents, wherever residing, might, by a singular perversion of the purposes of a municipal corporation, be admitted to freedom or membership, unless expressly restrained by the charter; and if residence was expressly required as a condition of eligibility, it was not necessary that the officer should continue to reside in the place while holding the office. Not only so, but it was held that where residence was necessary as a qualification during office, it was not, by implication, necessary that the person elected should have been a resident at the time of the election. And when inhabitancy was requisite, it meant not merely residence, but keeping a house within the place, and paying scot and lot: Willcock on Munic. Corp. 188, pl. 472; *ib.* 191, pl. 481; *ib.* 193, 488; Rex *v.* Monday, Cowp. 539; Rex *v.* Mallet, 2 Barnard. 408; Rex *v.* Cambridge, 4 Burr. 2008; Rex *v.* Heath, 1 Barnard. 417. These rules are of very doubtful application in this country, since here all of the inhabitants are members of the corporation, and non-residents cannot become such. And, in general, it may be said that a person is an inhabitant or resident who has his domicil or home in the place; but it is foreign to the purpose of this

tended to the higher offices, are hardly consistent with the fundamental idea of municipal government.

§ 135. The *choice of a disqualified person* is ineffectual. Thus, if the law requires freeholders to be chosen for certain officers, the election of a person not a freeholder is void.[1] But unless the votes for an ineligible person are expressly declared to be *void*, the effect of such a person receiving a majority of the votes cast is, according to the weight of American authority, and the reason of the matter (in view of our mode of election, without previous binding nominations, by secret ballot, leaving each elector to vote for whomsoever he pleases), that a new election must be held, and not to give the office to the qualified person having the next highest number of votes.[2]

work to enter into the difficult questions which have arisen with respect to residency and domicil: Hinds *v.* Hinds, 1 Iowa, 36; Story, Confl. Laws, Sec. 43; Putnam *v.* Johnson, 10 Mass. 488; Thorndike *v.* Boston, 1 Met. 245. Public officers vacate their office by permanent removal from the territorial limits of the corporation: Barre *v.* Greenwich, 1 Pick. 120; Rumsey *v.* Campton, 10 N. H. 567; Giles *v.* School District, 11 Fost. 304. But a *temporary* removal, with an intention to return, will not, of itself, have this effect: Van Orsdall *v.* Hazard, 3 Hill (N. Y.), 243, 1842; People *v.* Metropolitan Police Board, 19 N. Y. 201; Lyon *v.* Commonwealth, 3 Bibb (Ky.), 430; Rex *v.* Exeter, Comb. 197.

[1] Spear *v.* Robinson, 29 Maine, 531, 1849; State *v.* Swearingen, 12 Geo. 23, 1852; State *v.* Gastinel, 20 La. An. 114, 1868.

[2] State *v.* Swearingen, 12 Geo. 23; State *v.* Giles, 1 Chand. (Wis.) 112; State *v.* Smith, 14 Wis. 497; Saunders *v.* Haynes, 13 Cal. 145; State *v.* Gastinel (under charter), 20 La. An. 114; Cooley, Const. Lim. 620; Commonwealth *ex rel.* McLaughlin *v.* Cluley, Sheriff, Pitts. Leg. Jour. February 3, 1868. But in Indiana the view is taken that, whether an election, because of the ineligibility of the candidate receiving the highest number of ballots, is a failure, and must be held over, or whether the highest eligible candidate is elected, depends upon circumstances: 1. If the candidate receiving the highest number of votes is ineligible, but from a cause *unknown* to the voters, and which they were *not bound to know*—as, for example, infancy, want of naturalization, and the like—the result is a failure, and there must be another election. 2. If the voters know, or are bound to know, the ineligibility of a candidate, the election is not a failure, as the eligible candidate receiving the highest number of votes is legally elected. 3. Where the ineligibility of a candidate arises from his holding, or having held, a public office, the people within the jurisdiction of such office are held in law to know—are chargeable with notice of—such ineligibility, and votes given for such candidate are of no effect, and his highest eligible competitor is elected: Gulick *v.* New, 14 Ind. 93, 102, 1860, *per Perkins*, J.;

§ 136. Where it is discretionary with the municipal authorities whether they will hold an election or not, votes at an *unauthorized election* are simply nullities.[1] Elections fixed by law at a certain time and place may be legally holden, although notice has not been published or given; but if the time be not defined by statute, and is to be fixed by notice, the notice required is imperative.[2] Time and place are generally essential, but many of the details as to the conduct of elections are usually regarded as directory.[3] Courts are anxious rather to sustain than to defeat the popular will.[4]

commenting on State *v.* Swearingen (case of non-residency), 12 Geo. 23; Opinion of Judges, 38 Maine, appendix, where a portion of the people voted for a person not in being; State *v.* Giles, 1 Chand. (Wis.) 112.

In England, candidates are previously nominated and known, and the votes are, or at least until very recently have been, open, and there are cases there which decide or favor the proposition that votes for a disqualified person, given after notice of disqualification, are thrown away, and the other candidate is elected: Grant on Corp. 203–208, and cases cited. But see, as to disqualification and notice: Regina *v.* Hiorns, 7 Ad. & E. 690; Regina *v.* Councillors of Derby, 7 Ad. & E. 419; and particularly Regina *v.* Mayor of Tewkesbury, Q. B. A. D. 1868; *Ex relatione* Stone, *ib.;* Regina *v.* Ledyard, 8 Ad. & E. 535; Rawlinson on Corp. (5th ed.) 64, note, and authorities.

[1] Opinions of Judges, 7 Mass. 525; Same, 15 *ib.* 537; Cooley, Const. Lim. 603.

[2] Cooley, Const. Lim. 303, and cases cited; People *v.* Brenham, 3 Cal. 477, 1851; People *v.* Fairbury, 51 Ill. 149, 1869.

[3] Dickey *v.* Hurlburt, 5 Cal. 343; People *v.* Knight (essentialness of place), 13 Mich. 424. Where the legislature provided that the polls of the different wards should be kept open until 10 o'clock P. M. and they were closed at 8 o'clock, the election was set aside: Pennsylvania District Election, 2 Par. (Pa.) 526; Clark's Case, *ib.* 521. Illegal adjournment of election to a different place from the one designated in the notice: Commonwealth *v.* Commissioners, &c. 5 Rawle, 75. Where an election is held on a day subsequent to that named in the charter, the acts of officers thus elected are valid, as respects the public and third persons, and cannot be collaterally inquired into: Coles County *v.* Allison, 23 Ill. 437, distinguished from Haynes *v.* Washington County, 19 Ill. 66, and approved in People *v.* Fairbury, 51 Ill. 149, 1869. Title of officers elected before the legal incorporation of a place may be validated by the legislature: State *v.* Kline, 23 Ark. 587.

[4] Skerritt's Case, 2 Par. (Pa.) 516; Boileau's Case, 2 Par. 505; Carpenter's Case, 2 Par. 537; New Orleans *v.* Graihle, 9 La. An. 573; Clifton *v.* Cook, 7 Ala. 114; People *v.* Cook, 14 Barb. 259; 8 N. Y. 67. The rule as therein stated is regarded by Mr. Justice *Cooley* as "an eminently proper one, and

§ 137. Thus, an inaccurate designation of the name of the office voted for—as, for example, "Police Justice" instead of "Police Magistrate" (the term used in the statute)—will not render the votes invalid, where the legislative provisions make clear the intention of the voters in thus casting their ballots—to which intention effect should be given.[1] But if a specific number of officers only can be chosen—for example, *four*—ballots containing the names of *more* than four persons for the office in question must be rejected. Any other doctrine might result in giving the elector two votes. There are usually two competing tickets, and if an elector can, in the case supposed, cast a ballot containing *five* names, he may one of *eight*, and thus vote (if he chooses to insert the names) for both tickets.[2]

to furnish a very satisfactory test of what is essential, and what not, in election laws:" Const. Lim. 618. See, also, as to charter elections and returns: *Ex parte* Heath, 3 Hill (N. Y.), 42, 53; People *v.* Stevens, 5 Hill, 616; Morgan *v.* Quackenbush, 22 Barb. 72. Courts will not enjoin municipal elections unless the power and right to do so plainly exist: Smith *v.* McCarthy, 56 Pa. St. 359.

[1] People *v.* Matteson, 17 Ill. 167, 1855.

[2] People *v.* Loomis, 8 Wend. 396, 1832; People *v.* Seaman, 5 Denio, 409. Where only one vacancy exists, votes given for two persons jointly are thrown away: Rex *v.* Mayor of Leeds, 7 Ad. & E. 963; and in this case it was held that a third candidate chosen by a single regular vote was elected; but as to votes being thrown away, see *supra*. Where, by an erroneous construction of the act, an election has been held for but one councillor, instead of two, the candidate second on the poll cannot have a *mandamus* to admit him to the office: Regina *v.* Hoyle, H. T. 1855, cited in Rawl. on Corp. 65, note. His remedy is, by *mandamus*, to have a new election held for councillor, or (if the office be filled) by a *quo warranto*: *Ib.* The *voting papers* (corresponding in function to the American ballot, except that it is to be signed by the voter and openly voted) must distinguish between different classes of candidates; and hence where an election of four councillors had taken place on the 1st of November, three of whom were to supply ordinary vacancies, and one an extraordinary vacancy, but no distinction had been made between them in the notice of election, in the voting papers, or in publishing the names of the persons elected, the election was irregular and void: Regina *v.* Rowley, 3 Q. B. 143; S. C. in Exchequer Chamber, 6 Q. B. 668. See Sec. 47, Municipal Corporations Act, and also 7 Will. IV. and 1 Vict. Chap. LXXVIII. Sec. 11. *Patterson*, J., says: "There is no objection to the votes all being given on the same paper, if a proper distinction were made:" Regina *v.* Rowley, *supra;* and see Rex *v.* Winchester, 2 Ad. & E. 215. By the Municipal Corporations Act, Sec. 32, the voting paper is required to contain "the *Christian* and surnames of the persons for whom the

§ 138. Receiving illegal or improper votes will not alone vitiate an election. It must be shown affirmatively, in order to overturn the declared result, that the wrongful action *changed* it. This rule applies to corporation elections as well as others.[1]

Special Tribunal to Decide Election Contests for Municipal Offices.

§ 139. A *constitutional provision* that the *judicial power* of the state shall be vested in a supreme and inferior courts, does not disable the legislature, in creating municipal corporations, from providing that the *city council shall be the judge* of the election of its mayor, members, and other officers, and from prohibiting the ordinary courts of justice from inquiring into the validity of the determination of the city council.[2]

burgess votes, with their respective *places of abode*, such voting paper being previously *signed* with the *name* of the burgess voting and the name of the street in which the property for which he appears to be rated is situate." In construction of this section, it is held that the Christian name of the person voted for need not be written out in full; the contraction ordinarily used is sufficient: Regina *v.* Bradley, 3 E. & E. 634. But it seems that an initial letter only would not be sufficient: *Ib.* Though it would be in the signature of the voter: Regina *v.* Avery, 18 Q. B. 576; Regina *v.* Tart, 1 E. & E. 618. "Places of abode" held to mean places of residence, not of business: Regina *v.* Hammond, 17 Q. B. 772; Regina *v.* Deighton, 5 Q. B. 896; Dav. & M. 682.

[1] *Ex parte* Murphy, 7 Cow. 153, 1827; People *v.* Cicotte, 16 Mich. 283, 1868; First Parish *v.* Stearnes, 21 Pick. 148; Johnston *v.* Charleston, 1 Bay (S. C.), 441, 1795. In this last case the city council was specially authorized to judge of elections of corporation officers, and the court, respecting a contest before the council, said: "If the bad votes be deducted from the highest candidate, and he still has a majority, his election is good; but if, after such deduction, the next candidate has an equal or greater number of votes than the other, and *it is doubtful* which candidate had the greatest number of valid votes, the council should send the matter back to the people."

[2] Mayor, &c. *v.* Morgan, 7 Martin, La. (O. S.) 1; 9 *ib.* (N. S.) 381, 1828; *infra*, Sec. 182. In Wammacks *v.* Holloway, 2 Ala. 31, 1841, a shrievalty contest, it was denied that it was within the constitutional power of the legislature to deprive a party claiming a public office of the right to a jury trial by making the summary or extra-judicial method conclusive. And to this effect was the opinion of two of the judges in The People *v.* Cicotte, 16 Mich. 283. Since elections to offices are not in the nature of contracts, there does not seem to be any substantial reason, in view of the plenary

§ 140. Where, by the charter, the council are authorized to provide, by ordinance, a *special tribunal* before which contested municipal elections shall be tried, and to provide the mode of procedure, it may pass such ordinance *after* an election has been held, and authorize it to determine contests arising out of a previous election. After such determination, *quo warranto* will lie against the party who was unsuccessful before the local tribunal, if he continue to claim and exercise the office.[1]

§ 141. *Common law courts of general and original jurisdiction* have the admitted power to inquire into the regularity of elections, corporate and others, by *quo warranto*, or an information in that nature, and, in certain cases, by *mandamus*. It is not unusual for charters to contain provisions to the effect that the common council or governing body of the municipality "shall be the judge of the qualifications," or "of the qualifications and election of its own members," and of those of the other officers of the corporation. What effect do provisions of this kind have upon the jurisdiction of the superior courts? The answer must depend upon the language in which these provisions are couched, viewed in the light of the general laws of the state on the subjects of contested elections and *quo warranto*. The principle is, that the jurisdiction of the courts remains unless it appears with unequivocal certainty that the legislature intended to take it away. Language like that quoted above will not, ordinarily, have this effect, but will be construed to afford a cumulative or primary tribunal only, not an exclusive one. A provision that no court should take cognizance of election cases by *quo warranto*, &c. would doubtless be sufficient to divest the jurisdiction of the judicial tribunals. And so, perhaps, of a provision that

authority of the legislature over offices and officers, to doubt its power to provide, prospectively, by a general act, the mode in which contests shall be determined. See State *v.* Fitzgerald, 44 Mo. 425, 1869; Ewing *v.* Filley, 43 Pa. St. 384; Commonwealth *v.* Leech, 44 Pa. St. 332; Cooley, Const. Lim. 276; *ib.* 623, 624, note; Smith *v.* New York, 37 N. Y. 518; People *v.* Mahaney, 13 Mich. 481.

[1] State *v.* Johnson, 17 Ark. 407, 1856 (mayoralty contest).

the council should have the *sole*, or the *final*, power of *deciding* elections.[1]

§ 142. Agreeably to the rule just stated, a clause in the charter of a municipal corporation, that the city council "shall be the judges of the election, returns and qualifications of their own members, and of all other officers of the corporation," was held by the Supreme Court of Delaware not to oust the Superior Court of the state (invested with the usual powers of the King's Bench) of its superintending jurisdiction over corporations, and it was declared, if the council should erroneously decide that a person duly elected by the people to an office was not qualified to hold it, a *mandamus* might issue commanding them to admit him to the office.[2]

[1] *Ex parte* Heath, 3 Hill (N. Y.), 42, 52, and cases cited by *Cowen*, J., who is of opinion that no mere negative words, and that nothing less than *express words*, will oust the supervisory jurisdiction of the courts. Greer *v.* Shackelford, Const. Rep. 642; State *v.* Fitzgerald, 44 Mo. 425, 1869; Commonwealth *v.* McCloskey, 2 Rawle, 369 (two judges dissenting); *Ex parte* Strahl, 16 Iowa, 369, 1864; State *v.* Funck, 17 Iowa, 365, 1864; Bateman *v.* Megowan, 1 Met. (Ky.) 533; Wammacks *v.* Holloway, 2 Ala. 31, 1841 (sheriffalty contest); Hummer *v.* Hummer, 3 G. Greene (Iowa), 42; Macklot *v.* Davenport, 17 Iowa, 379; State *v.* Marlow, 15 Ohio St. 114; *post*, chapters on *Quo Warranto*, *Mandamus*, and Remedies against Illegal Corporate Acts. Action of board of canvassers not conclusive of the right of the party to an office, though it may deprive him, in the first instance, of a commission or certificate. *Quo warranto* lies notwithstanding the determination of the board of canvassers, on which full investigation may be had. State *v.* Governor, 1 Dutch. (N. J.) 331, 1856; State *v.* The Clerk, *ib.* 354; People *v.* Kilduff, 15 Ill. 492; Cooley, Const. Lim. 623, and cases cited; Hadley *v.* Mayor, 33 N. Y. 603, 1865.

A *special remedy* given by statute *is cumulative* and not exclusive of the ordinary jurisdiction of the courts, unless such be the manifest intention of the statute: Attorney General *v.* Corporation of Poole, 4 Mylne & Cr. 17, overruling 2 Keen, 190. See, also, Attorney General *v.* Aspinwall, 2 Mylne & Cr. 613. And hence a breach of a public trust by a municipal corporation is held, in England, to be cognizable in chancery, notwithstanding a special appeal be given in the particular matter to the lords of the treasury. *Ib.;* Parr *v.* Attorney General, 8 Cl. & F. 409; Attorney General *v.* Corporation of Lichfield, 11 Beav. 120. See chapter on Remedies against Illegal Corporate Acts, *post*.

[2] State *v.* Wilmington, 3 Harring. (Del.) 294, 1840; S. P. State *v.* Fitzgerald, 44 Mo. 426, 1869. So, in Iowa, where the city charter provided that the council should be "the judge of the election and qualifications of its own members," but no ordinance had been passed prescribing any method of

§ 143. Where the *legislative intent* is clear, *that the action of the council* in contested election cases *shall be final*, the courts will not inquire into election frauds, since the council is the judge of this matter as of others pertaining to the election; but the courts will inquire whether, in point of law, there was an office or vacancy to be filled.[1]

§ 144. Where, by statute, the returns of all municipal elections were declared to be "subject to the inquiry and determination of the Court of Common Pleas upon the complaint of fifteen or more voters filed in said court within twenty days, and the court, in judging of such elections, was directed to proceed upon *the merits* thereof, and *determine finally* concerning the same according to the laws of the commonwealth," this was held to exclude the remedy by *quo warranto* and all common law remedies as to matters which might have been investigated in the special mode prescribed by the statute.

trial, it was held that the mere provision in the charter did not preclude a contestant from a resort to an information in the nature of a *quo warranto:* State *v.* Funck (mayoralty contest), 17 Iowa, 365, 1864. In a previous case, the same court decided that under a charter making the council "judges of the election, returns and qualifications of their own members," it was competent for the council to pass a general ordinance providing for the trial of contested elections of city officers, and making the council the tribunal for the trial of the same, such an ordinance being consistent with the general laws of the state, which, in providing special tribunals for contesting state, county, and township offices, omitted to make any specific provision for contested elections to municipal offices: *Ex parte* Strahl, 16 Iowa, 369, 1864 (mayoralty contest).

[1] Commonwealth *v.* Leech, 44 Pa. St. 332, 1863; Commonwealth *v.* Meeser, *ib.* 341. Construction of words making the number of members of the council from a ward depend upon "the *list* of the taxable inhabitants." *Ib.* People *v.* Wetherell, 14 Mich. 48; Tompert *v.* Lithgow, 1 Bush (Ky.), 176, 1866.

Pending legal proceedings, the court in favor of the officer apparently entitled, *enjoined the adverse* claimant from attempting to take possession of the office: Ewing *v.* Thompson, 43 Pa. St. 384, 1862; Kerr *v.* Trego, 47 Pa. St. 16, 292, 1864. Certificate of election is the *prima facie* written title to office, and remains so until regularly set aside or annulled: *Ib.*

The *council, as board of canvassers*, cannot investigate the *legality* of an election, but are concluded by the returns of the judges; but the council, when sitting as a tribunal to judge of the election of members of their body, may go behind the returns and inquire into the fact as to who is elected: State *v.* Railway, 33 N. J. Law, 111, 1868.

The opinion was expressed that the judgment of the Common Pleas was final; that it could not be reversed by *quo warranto* or in any other collateral manner, and that even a *certiorari* would enable the Appellate Court to examine only the regularity of the proceedings of the Common Pleas, but not to examine the case on its merits as disclosed in the evidence.[1]

[1] Commonwealth *v.* Garrigues, 28 Pa. St. 9, 1857; Commonwealth *v.* Baxter, 35 Pa. St. 263; Commonwealth *v.* Leech, 44 Pa. St. 332: Followed and approved, State *v.* Marlow, 15 Ohio St. 114; see Ewing *v.* Filley, 43 Pa. St. 386; Lamb *v.* Lynd, 44 Pa. St. 336. Function and powers of common council as election canvassers: Morgan *v.* Quackenbush, 22 Barb. 72. A city council, under authority "to canvass returns and determine and declare the result" of elections to municipal offices, exhausts its power when it has once legally canvassed the returns and declared the result, and it cannot, at a subsequent meeting, make a re-canvass and reverse its prior determination: Hadley *v.* Mayor, 33 N. Y. 603, 1865. The rule stated in the text, that the original or superintending jurisdiction of the Superior Courts should not be held to be taken away by any language which does not expressly, or by unequivocal implication, show this to have been the legislative intention, is a salutary one, but seems, in some cases, not to have been very strictly observed. In *Texas*, where the statute conferred upon the County Court the power to determine contested elections of county officers, and gave no right to appeal, it was considered to be the policy of the statute to secure an early determination of such disputes, and it was held that the judgment of the County Court could not be revised either upon appeal or *certiorari*, and was final: O'Docherty *v.* Archer, 9 Texas, 295, 1852. *Post*, Chap. XXII.

The constitution of *Ohio* requires the general assembly "to determine, by law, before what authority, and in what manner, the trial of contested elections shall be conducted," and accordingly a specific mode of contesting elections in that state was provided by statute; and this mode was held to exclude the common law mode by proceedings in *quo warranto*, and the result to bind the state as well as individuals: State *v.* Marlow, 15 Ohio St. 114, 1864.

In *South Carolina* it was held, where the legislature had authorized managers of elections "to hear and determine" cases of contested elections, without making any provision for an appeal, or any reference in the act to proceedings by *quo warranto*, that their decision was, without any express statutory declaration to that effect, final and conclusive, and that courts had no control over it: Grier *v.* Schackelford, 3 Brev. (South Car.) 491, 1814 (*Nott*, J., dissenting); followed in the State *v.* Deliesseline, 1 McCord, (South Car.), 52, 1821 (two judges dissenting). See State *v.* Huggins, Harper Law, 94, 1824. But note remarks of *Evans*, J., in State *v.* Cockrell, 2 Rich. (South Car.) Law, 6, who, speaking of the subsequent act of 1839 (requiring the managers to hear and determine the validity of the election, and providing that their "decision shall be final"), says: "I take it to be clear that the validity of an election, in all cases, must [under the act], in the

Power to Create and Appoint Municipal Officers.

§ 145. At *common law*, municipal corporations *may appoint officers*, but only such as the nature of their constitution requires. The right of electing such officers as they are authorized to have is incidental to every corporation, and need not be conferred by charter. The power of appointing officers is, at common law, to be exercised by the corporation at large, and not by any select body, unless it is so provided in the charter. The powers of corporate officers proper, at common law, are very limited, extending only to the administration of the by-laws and charter regulations of the corporation.[1]

§ 146. In this country the constitution of the corporation usually provides with care as to all the *principal officers*, such as mayor, aldermen, marshal, clerk, treasurer, and the like, and

first instance, be decided by the Court of Managers duly organized according to law. All questions, whether of law or fact, must be submitted to this tribunal. Their decisions, on questions of fact, must necessarily be final, as no appeal is given; but I do not mean to say that their errors of law may not be corrected by *certiorari*, or such of the prerogative writs as may be best suited to the case." Accordingly, where an election, within the act, had not been contested before the managers, the court refused leave to file an information in the nature of a *quo warranto*. It was afterwards stated, by a distinguished judge in that state, that the scrutiny of municipal elections, as an incidental power, belongs, in the first place, to the city council, and if they abuse that power, the correction of that abuse devolves upon the courts by information in the nature of a *quo warranto*: *Per O'Neall*, J., in State *v.* Schnierie, 5 Rich. Law (South Car.), 299, 301, 1852 (*Quo. War.* to test validity of defendant's election as mayor of Charleston). S. P. Johnson *v.* Charleston, 1 Bay (South Car.), 441, 1795. But the city council, in order to determine a contest for a municipal office, cannot swear the individual voters to compel them to declare for whom they voted. This is an inquisitorial power unknown to the principles of our governnent, and of dangerous tendency: *Ib.* See, also, People *v.* Pease, 27 N. Y. 81; People *v.* Cicotte, 16 Mich. 283; Cooley, Const. Lim. 604–606. Election contests for office will not be determined on *habeas corpus*: *Ex parte* Strahl, 16 Iowa, 369; nor, in general, on bill in equity: Hagner *v.* Heyberger, 7 Watts & S. 104; but see Kerr *v.* Trego, 47 Pa. St. 292; Hughes *v.* Parker, 20 N. H. 58; Cochran *v.* McCleary, 22 Iowa, 75, 1867, and chapter on Corporate Meetings, *post*. But as to county seat contest, where fraud is alleged, see Brown *v.* Smith, 46 Ill. See, also, Chap. XXII. *post*.

[1] Willc. 234, pl. 598; *ib.* 297, pl. 767; *ib.* 298, pl. 769; Glover, 220; Vintners *v.* Passey, 1 Burr. 237; Hasting's Case, 1 Mod. 24; Rex *v.* Barnard, Comb. 416.

prescribes their various duties. This leaves but little necessity or room for the exercise of any implied power to create other offices and appoint other officers.[1] It is supposed, however, when not in contravention of the charter, that municipal corporations may, to a limited extent, have an incidental right to create certain minor offices of a ministerial or executive nature. Thus, if power be conferred to provide for the health of the inhabitants, this would give the corporation the right to pass ordinances to secure this end, and the execution of such ordinances might be committed to a health officer, although no such officer be specifically named in the organic act, if this course would not conflict with any of its provisions. But the power to create offices even of this character would be limited to such as the nature of the duties devolved on the corporation naturally and reasonably required.

The provisions of the charter as to time and mode of election, the appointment, qualifications, and duration of the terms of officers, must be strictly observed. Therefore, an ordinance which makes eligible those who, by the charter, are not so,[2]

[1] Where it was manifest, from the whole tenor of a city charter, that it was the intention of the legislature itself to specify therein all the offices, and designate all the officers to be elected or chosen, and to regulate the mode of appointment, it was held that the city council could not, by virtue of an inherent or implied power, create another officer, fix his term, provide for his appointment, and clothe him with the powers of a municipal officer: Hoboken *v.* Harrison, 1 Vroom (N. J.), 73, 1862. It is said, in the opinion, that the power to create municipal offices should be *expressly* conferred. In New Jersey, pound-keepers, from a very early period, had been public *township* officers, elected in the same way as other officers of the township. Under these circumstances it was held that a municipal corporation could not, without express authority therefor, establish another public pound within the limits of the township, and prescribe regulations and fees variant from those prescribed by the general law; and it was further held, that the office of pound-keeper could not be considered as one essential to the business of the corporation; nor is a pound-keeper one of those subordinate officers which all municipal corporations may, as of course, appoint. It was, however, admitted by the court, that where such a corporation has power to do an act, it has the incidental power to appoint persons to carry it into effect: White *v.* Tallman, 2 Dutch. (N. J.) 67, 1856. Authority to a municipal corporation to appoint an officer was inferred from the frequent mention of the office and its duties in the charter: People *v.* Bedell, 2 Hill (N. Y.), 196; see, also, Field *v.* Girard College, 54 Pa. St. 233.

[2] Rex *v.* Mayor of Weymouth, 7 Mod. 373; Rex *v.* Bumstead, 2 B. & Ad. 699; Rex *v.* Spencer, 3 Burr. 1827; Rex *v.* Chitty, 5 Ad. & E. 609.

or which abridges the term of officers as fixed by the charter, is unauthorized and void.[1]

§ 147. Every municipal corporation is provided with an *executive head*, usually styled the *mayor*. In the chapter on Corporate Meetings we have pointed out the difference, in some respects, between the mayor of an old corporation in England and the officer known by that name in this country. In both countries the mayor is the head officer or executive magistrate of the corporation; but with us it is important to bear in mind that all his powers and duties depend entirely upon the provisions of the charter or constituent acts of the corporation, and valid by-laws passed in pursuance thereof, — and these vary, of course, in different municipalities. It is usually made his duty, however, to see that municipal ordinances are executed, and to preside at corporate meetings; and he is frequently expressly declared to be a member of the council or local legislative body. Properly and primarily his duties are executive and administrative, and not judicial or legislative. But judicial duties are often superadded to those which properly appertain to the office of mayor, and he is invested with the authority to administer not only the ordinances of the corporation, but also, judicially, to administer the laws of the state.[2]

[1] Stadler *v.* Detroit, 13 Mich. 346, 1865; Vason *v.* Augusta, 38 Geo. 542, 1868: chapter on Ordinances, *post.* The office of treasurer of a municipal corporation is not a "civil office" within the meaning of the provision of the constitution excluding the clergy from "holding any *civil office* in this state, or from being a member of the legislature": State *v.* Wilmington, 3 Harring. (Del.) 294, 1840; see Commonwealth *v.* Dallas, 3 Yeates (Pa.), 300. "Lucrative offices," in the constitutional sense, defined to embrace county recorder, commissioner, township trustee, and supervisor: Daily *v.* State, 8 Blackf. 329; Creighton *v.* Piper, 14 Ind. 182.

[2] Waldo *v.* Wallace, 12 Ind. 569, 1859, and growing out of it, see, also, Gulick *v.* New, 14 *ib.* 93, 1860; Reynolds *v.* Baldwin, 1 La. An. 162, 1846; Muscatine *v.* Steck, 7 Iowa, 505; 2 *ib.* 220; *Ex parte* Strahl, 16 Iowa, 369; Shafer *v.* Mumma, 17 Md. 331; Slater *v.* Wood, 9 Bosw. 15. *Ante*, Chap. III. Morrison *v.* McDonald, 21 Maine, 550, 1842; State *v.* Maynard, 14 Ill. 419; Commonwealth *v.* Dallas, 3 Yeates (Pa.), 300, 1801; Starr *v.* Wilmington, 3 Harring. (Del.) 294, 1839.

Power of Mayor, in his official name, to bring *suit* to prevent or restrain violations of law by other municipal officers declared: Genois, Mayor, &c.

§ 148. The *office of mayor* has long existed in England,[1] and many of its general features have been adopted in this country. In a former page suggestions have been made in favor of increasing its dignity and responsibility, as a means of insuring

v. Lockett, 13 La. 545, 1838. But *quære?* The mayor of a city has no incidental power to execute an *appeal bond* for the corporation; and such a bond was regarded as not even incidental to the power of taking an appeal, but must be authorized by the council: Baltimore *v.* Railroad Co. 21 Md. 50, 1863. A precept to collect a street assessment, signed by a member of the council acting temporarily as president thereof, is void, when the statute requires the *signature* of the mayor: Jeffersonville *v.* Paterson, 32 Ind. 140, 1869. Injunction will lie to restrain a sale on such a precept: *Ib.* See chapter on Remedies against Illegal Corporate Acts, *post.*

As to nature and extent of authority of mayors and other civil officers to employ force for the prevention or suppression of *mobs, riots,* &c.: See Ela *v.* Smith, 5 Gray, 121, 1855, arising out of the arrest of Anthony Burns as a fugitive slave. Power of mayor to order demolition of works and buildings in *public places:* Henderson *v.* Mayor, 3 La. 563. Mayor may sanction an ordinance passed by a common council whose term has expired: Elmendorf *v.* Ewen, 2 N. Y. Leg. Obs. 85. *Notice to mayor:* Nichols *v.* Boston, 98 Mass. 39. *Police and executive power of Mayor:* Shafer *v.* Mumma, 17 Md. 331; Slater *v.* Wood, 9 Bosw. 15; Pedrick *v.* Bailey, 12 Gray, 161; Nichols *v.* Boston, 98 Mass. 39. Alderman acting as mayor: State *v.* Buffalo, 2 Hill, 434. Judicial power of mayor: See Municipal Courts, *post.* Presence and functions of mayor at meetings of the council: See the chapter on Corporate Meetings, *post.*

[1] *History and nature of office of Mayor,* consult: 4 Jacob's Law Dict. 264, 265; 2 Toml. Law Dict. 540; 2 Bouv. 150. Spelm. Gloss. "Mayor;" Ela *v.* Smith, 5 Gray (Mass.), 521, 1855; Achley's Case, 4 Abb. Pr. Rep. 35, 1856; Cochran *v.* McCleary, 22 Iowa, 75, 82, 1867; Nichols *v.* Boston, 98 Mass. 39; Fletcher *v.* Lowell, 15 Gray, 103. The office in England is quite ancient; In 1204 King John made the bailiff of King's Lynn a mayor, with administrative powers. The title was a common one as early as the time of Bracton.

Mr. Norton, in his valuable "Commentaries on the History, Constitution, and Chartered Franchises of the City of London," says that the first *specific* grant of the *mayoralty* to the city of London was made by King John in a charter dated on the 9th day of May, in the sixteenth year of his reign, A. D. 1207. This charter declares that the king has granted and confirmed to the barons of London the right of choosing a mayor every year, and at the end of the year of removing him and substituting another, if they will, or electing the same again. He is to be presented to the king, and swear to be faithful to him. The use of the word *confirmed,* in this charter, shows that the name and officer existed before. The first civic magistrate had begun to be called by the name of mayor toward the end of the reign of his predecessor, Richard. The denomination of *mayor,* it is said on the authority of legal antiquaries, can be traced to a very far date among the

more satisfactory municipal rule; but the subject is not sufficiently connected with practical law to warrant more than an allusion to it in a work of this character.[1]

§ 149. The office of a *Police Officer* is not known to the common law; it is created by statute, and such an officer has, and can exercise, only such powers as he is authorized to do by the legislature, expressly or derivatively.[2] Where police officers are, by statute, invested with of all the powers of constables, as conservators of the peace, this gives them authority to *arrest, upon view*, intoxicated persons while guilty of disorderly conduct, or other persons violating the laws, and to

German and French nations of Europe. The chief governor of the town communities which arose in France in the eleventh century, was often styled the mayor. It is a matter of history, that in France, the *mayor of the palace* was the governor of Paris, often holding sovereign power, and, indeed, in time, usurping it, since it was from one of the mayors of the palace that the family of Charlemagne descended. And it is suggested by Mr. Norton that the term mayor, familiar to the Normans, may have been originally, though remotely, derived from the same source: Norton's Com. pp. 90, 402, 403; see, also, Pulling's Laws, Customs, &c. of London, Chap. II. 16 *m*.

[1] *Ante*, Chap. I. pp. 23, 24, and notes.

[2] Commonwealth *v.* Dugan, 12 Met. 233, 1847; Commonwealth *v.* Hastings, 9 Met. 259; *ante*, p. 76, Sec. 33; p. 78, Sec. 34. In Massachusetts they are peace officers, and a person who assaults or obstructs them in the discharge of their duties, is indictable, though they have never been sworn — the statute not requiring this: Buttrick *v.* Lowell, 1 Allen, 172; Mitchell *v.* Rockland, 51 Maine, 118, 122. In The People *v.* Metropolitan Police Board, 19 N. Y. 188, 1859, growing out of the act to establish a Metropolitan Police District, it was decided by a majority of the Court of Appeals that, though the office was a new one, yet the mode of filling it not being provided by the constitution, it was in the power of the legislature to confer it upon persons discharging substantially the same duties within a more limited territorial jurisdiction, and to dispense with an oath of office. See, also, People *v.* Draper, 15 N. Y. 532, 1857, where the Court of Appeals held the "Act to establish a Metropolitan Police District" valid; approved, Metropolitan Board of Health *v.* Heister, 37 N. Y. 661, 1868; McDermott *v.* Metropolitan Police Board, 5 Abb. Pr. 422; Police Commissioners *v.* Louisville, 3 Bush (Ky.), 597, 1868; *ante*, p. 77, and notes. Extent of legislative power and control over appointment, powers, &c. of police, health, and other local officers: Baltimore *v.* Board of Police (Baltimore Police Act), 15 Md. 376, 1859; Metropolitan Board of Health *v.* Heister, 37 N. Y. 661, 1868; People *v.* Hurlburt, Michigan Supreme Court, 1871 (not yet reported); Police Commissioners *v.* Louisville, above cited; *ante*, pp. 76, 77. Mode of compensation: Worcester *v.* Walker, 9 Gray, 78.

detain them until they can be brought before a magistrate.[1] If such an officer releases an intoxicated person, whom he had arrested while conducting himself in a disorderly manner, upon his promise to go directly home, he may lawfully retake him, on his going into a bar-room before he is out of the officer's sight, and such arrest is justified, whether it be regarded as a re-caption for the original purpose, or as a new arrest for disorderly conduct still continuing.[2]

§ 150. Charters authorizing municipal officers to make *arrests upon view*, and *without process*, are to be viewed in connection with the general statutes of the state, and being in derogation of liberty, are strictly construed; hence an officer making such an arrest, though on the Sabbath day, should, instead of imprisoning, take, without unreasonable delay, the person arrested before the proper tribunal and prefer a complaint against him, as provided by the statutes of the state.[3]

[1] Taylor *v.* Strong, 3 Wend. 384, 1829; Bacon Ab. Constable, C.; Commonwealth *v.* Hastings, 9 Met. 259, 1845. As to power of constables in such cases, see 1 Hale, P. C. 587; Hawkins, P. C. Book II. Chap. XIII. Sec. 8. Where such a course is not repugnant to the general law of the state, the proper officers of a municipal corporation may be authorized to arrest, *without warrant*, or upon view, offenders who violate ordinances in the presence of such officers: Bryan *v.* Bates, 15 Ill. 87, 1853; Main *v.* McCarty, 15 Ill. 442; State *v.* Lafferty, 5 Harring. (Del.) 491.

Power to a city corporation to make ordinances for the security, or good order, or government of the place, and to appoint or elect officers to carry out ordinances, authorizes the appointment of city guards, or police officers, or peace officers, and such officers may arrest, without a warrant, persons engaged in breaches of the peace: City Council *v.* Payne, 2 Nott & McCord (South Car.), 475, 1820. A city council may authorize arrests *upon view*, without warrant, for violation of its by-laws, when not inconsistent with the general statutes or policy of the state: White *v.* Kent, 11 Ohio St. 550, 1860; Thomas *v.* Ashland, 12 *ib.* 127. But not otherwise. Thus, where the city charter declared all by-laws inconsistent with the general law to be void, and where the general law did not allow an officer to arrest for a misdemeanor not committed in his presence, without a warrant, it was held that an ordinance authorizing police officers to make arrests, without a warrant, for violation of ordinances not committed in their presence, was void, and would not protect the officer against a suit for trespass: Pesterfield *v.* Vickers, 3 Coldw. (Tenn.) 205, 1866.

[2] Commonwealth *v.* Hastings, *supra.* It follows that an obstruction offered by a third person, to the officer in making such an arrest, would be unjustifiable: *Ib.*

[3] Low *v.* Evans, 16 Ind. 486, 1868 (action for false imprisonment); Pow *v.* Becker, 3 Ind. 475, 1852; Vandever *v.* Mattock, 3 Ind. 479. In Low *v.* Evan

§ 151. A city council authorized to *elect* certain officers, may, where no mode of election is prescribed, appoint them by *resolution*, and is not bound to elect them by ballot;[1] and the corporation has full control, unless specially restricted, over all offices and officers existing only under by-laws.[2] A vote of an authorized committee of a city, electing their clerk city engineer for a year from a subsequent day, duly recorded, and signed by him as their clerk, is sufficient to take his appointment out of the statute of frauds.[3]

§ 152. The same presumptions which are applicable to individuals are, in general, applicable to acts of corporations. Thus, if a person acts notoriously as the officer of a corporation, and is recognized by it as such officer, a *regular appointment will be presumed*, and his acts will bind the corporation, although no written proof is or can be adduced of his appointment.[4]

it was also held that there was no authority in the officer making the arrest for imprisoning the party arrested for an indefinite time (*e. g.* from Sunday until the next day), because he may be subject to a penalty, to be recovered in a suit in the nature of an action of debt.

[1] Low *v.* Commissioners of Pilotage, R. M. Charlt. (Geo.) 302, 1830, *per Law*, J. *Ante*, p. 106, Sec. 58. Power of council to appoint, and when it may delegate this power to a committee: People *v.* Bedell, 2 Hill (N. Y.), 196; Commonwealth *v.* Pittsburg (police force), 14 Pa. St. 177, 1850; Wilder *v.* Chicago, 26 Ill. 182; Russell *v.* Chicago (collectors), 22 Ill. 285; *ante*, p. 108, Sec. 60.

[2] As to plenary power and control, when not restricted, of a municipal corporation over offices and officers existing only under ordinances, see People *v.* Conover, 17 N. Y. 64, 1858; Waldraven *v.* Memphis (right to abolish office), 4 Coldw. (Tenn.) 431, 1867; *infra*, Sec. 170. The power to appoint implies, in general, the power to remove the appointees: People *v.* Hill, 7 Cal. 97. Thus, a municipal corporation appointing commissioners in cases of local improvements, may remove them: People *v.* Mayor, &c. of New York, 5 Barb. 43, 1848. The exercise of the power to appoint to office is an executive, not a legislative, act: Achley's Case, 4 Abb. Pr. 35, 1856.

[3] Chase *v.* Lowell, 7 Gray, 33, 1856.

[4] Bank of United States *v.* Dandridge, 12 Wheat. (U. S.) 64, 70, where Mr. Justice *Story* cites many cases, establishing the principle "that the acts of artificial persons afford the same presumptions as the acts of natural persons."

Oath and Official Bond.

§ 153. All public officers are usually required to take an *oath of office*, and those entrusted with money or property are also generally required *to give bond and sureties* for the faithful performance of their duties. In England it is said that an oath of office cannot be required to be taken by a by-law when none is required by the charter.[1] But in this country the *oath of office* is, in substance, only that the officer will support the constitution and faithfully perform his official duties. And such an oath may, doubtless, be required, by ordinance, to be taken by every municipal officer before entering upon his office. Statutes requiring an oath of office and bond are usually directory in their nature; and unless the failure to take the oath or give the bond by the time prescribed, is expressly declared, *ipso facto*, to vacate the office, the oath may be taken or the bond given afterwards, if no vacancy has been declared.[2]

[1] Rex *v.* Dean, &c. 1 Str. 539; Glover, 305; Willc. 133; Grant, 76. It is the settled doctrine of the Supreme Court, that the United States, being a body politic, with a capacity to enter into contracts, may, within the sphere and in the execution of its appropriate powers, take bonds and securities, which are not prohibited by law, though such bonds and securities may not have been prescribed by any pre-existing legislative act. These, though voluntary,—that is, not extorted or coerced,—if taken for a lawful purpose and upon a good consideration, are valid: United States *v.* Tingey, 5 Pet. (U. S.) 114, 128, 1831, approved, Same *v.* Linn, 15 *ib.* 290, 1841; and see, Dugan *v.* United States, 3 Wheat. (U. S.) 172; United States *v.* Bradley, 10 Pet. (U. S.) 343. Right of city to require bond of indemnity from the owner, who proposes to excavate sidewalk to make cellars, vaults, or improvements: McCarthy *v.* Chicago, 53 Ill. 38, 1870.

[2] Smith *v.* Cronkhite, 8 Ind. 134; State *v.* Findley, 10 Ohio, 51, 59, and cases cited; State *v.* Porter (failure to give bond by city marshal in time), 7 Ind. 204; Sprawl *v.* Laurence, 33 Ala. 674; Bank *v.* Dandridge, 12 Wheat. 64; United States *v.* Le Baron, 19 How. 73; S. C. 4 Wall. 642; Marbury *v.* Madison, 1 Cranch. 137. A town *may lawfully require* a collector of taxes or other officer, to *furnish sureties* for the faithful discharge of the duties of his office. This power is incidental, and need not be express. If the person chosen neglects, or is unable, to furnish sureties, this amounts to a non-acceptance of the trust, although he has taken the oath of office: Morrell *v.* Sylvester, 1 Greenl. 248. While it is the duty of an officer to perfect his title to his office by complying with the *directions* of the law as to taking oath, depositing bonds, &c., yet his failure to do so is his own wrongful neglect, and is no defence to his sureties in an action on his offi-

§ 154. When the statute requires a prescribed oath of office *before* any person elected "*shall act therein*," a person cannot justify as such officer unless he has taken an oath in substantial, not necessarily literal, compliance with the law. Third parties, however, acting in good faith with him as such officer, are protected, notwithstanding his failure to take the requisite oath.[1]

§ 155. The principle is well settled, that *official bonds* are valid if the *condition complies substantially* with the requirements of the statute. The exact form prescribed is not essential unless made so by the charter or act.[2] As such bonds are intended to secure the public the *courts do not favor technical defences*. Accordingly, actions have been sustained on bonds,

cial bond: State *v.* Toomer, 7 Rich. (South Car.) Law, 216, 1854; State *v.* Findley, 10 Ohio, 51, 1840.

A city council, whose duty it is to decide upon the sufficiency of the sureties of a city officer, cannot refuse to do so or postpone its decision because the title to the office is elsewhere disputed, and a *mandamus* will lie to compel it to act upon the sufficiency of the securities offered: Commonwealth *v.* City Council of Philadelphia, 7 Am. Law Reg. (N. S.) 362.

[1] Olney *v.* Pearce, 1 Rh. Is. 292, 1850, and authorities cited by Mr. Angell in note; Riddle *v.* Bedford County, 7 Serg. &. Raw. 392; Neale *v.* Overseers, 5 Whart. (Pa.) 538. Where an officer, before acting, is required to qualify by taking an oath of office, he has no legal right, until he qualifies, to recover fees of an incumbent received after the plaintiff's appointment or election, and before he qualifies: Thompson *v.* Nicholson, 12 Rob. (La.) 326, 1845. See City *v.* Given, 60 Pa. St. 136.

If members of a common council, who are required by the charter to be sworn before they enter on the duties of their office, are sworn before an officer not authorized to administer the oath, they are still officers *de facto*, and a tax levied by them is not invalid, and will not be set aside even in a direct proceeding: State *v.* Perkins, 4 Zabr. (N. J.) 409, 1854.

An act of congress provided that paymasters should, "*previous to entering upon the duties of their office, give good and sufficient bonds*," &c. It was held, that an appointment as paymaster was complete when made by the president and confirmed by the senate; that the giving of the bond was a mere ministerial act for the security of the government, and not a condition precedent to his authority to act as paymaster; and that a recital in the bond of the appointment estops the principal and sureties to deny the fact: United States *v.* Bradley, 10 Pet. (U. S.) 343, 1836; and see, also, United States *v.* Dandridge, 12 Wheat. 64.

[2] Allegheny County *v.* Van Campen, 3 Wend. 49, 1829; People *v.* Holmes, 2 Wend, 281; *ib.* 615; Fellows *v.* Gilman, 4 Wend. 414; Lawton *v.* Erwin, 9 Wend. 233; Cornell *v.* Barnes, 1 Denio, 35.

not required by law, when executed voluntarily, and with proper conditions, to secure the performance of official duty.[1] And when required by law bonds are good, as common law obligations, though they do not conform to the statute, if they contain no condition contrary to law. In such case the obligor voluntarily agrees to make the obligee named a trustee for the persons interested in the due performance of the condition.[2] Thus, an action may be maintained on a bond given to the "selectmen" instead of to the "town," by a town treasurer, conditioned for the faithful performance of his duties.[3]

Duration of Official Term.

§ 156. It was a settled rule of law respecting the old corporations in England that the office of the mayor or other head officer was *annual*, and absolutely expired at the end of the year; and that without an express clause in the charter, he could not hold over until his successor was provided. The right, in such case, to *hold over* did not exist by implication,

[1] Postmaster General *v.* Rice, Gilpin, 554; Montville *v.* Haughton, 7 Conn. 543; Commonwealth *v.* Wolbert, 6 Binney, 292.

[2] Thomas *v.* White, 12 Mass. 369; 5 *ib.* 314; Kavanaugh *v.* Sanders, 8 Greenl. 442; Sweetzer *v.* Hay, 2 Gray, 49, and cases there cited.

[3] Sweetzer *v.* Hay, 2 Gray, 49; Horn *v.* Whittier, 6 N. H. 88. A bond given by the treasurer of a county for the faithful performance of his official duties, to the board of supervisors of the same county, is a good and valid bond, notwithstanding there may be no statute requiring one: Supervisors *v.* Coffinbury, 1 Mich. 355.

Municipal corporations may sue on official bonds of public officers when interested therein: State, &c. *v.* Norwood, 12 Md. 177, 1858. In an action on the official bond of an officer appointed by a municipal corporation, reciting the appointment of the principal as such officer, neither he nor his sureties can set up the invalidity of his appointment as a defence to an action for moneys collected: Hoboken *v.* Harrison, 1 Vroom (N. J.), 73; Seiple *v.* Elizabeth, 3 Dutch. 407. Sureties on official bond of *de facto* municipal officer are liable for moneys collected by him; and this though he was an officer which, in point of fact, the corporation could not create: 1 Vroom, 73, *supra*. A surety in an official bond of an officer whose term is limited to a year, is not liable beyond the year, though the officer continues by law until a successor is provided: Dover *v.* Twombly, 42 N. H. 59, 1860; Clemsford Co. *v.* Demorest, 7 Gray, 1, 1856; Mayor *v.* Horn, 2 Harring. (Del.) 190, 1833.

and was not an incident to the office.[1] In some charters, however, it was in terms provided that the mayor or other chief officer, though elected for a year, should hold until his successor was chosen.[2] When this right existed it was frequently abused, by neglecting to hold an election on the charter day, by which means the officer continued his term. It was this abuse that gave rise to the Statute of Anne, which enacted "that no person in such *annual* office for one whole year, should be capable of being chosen into the same office for the year immediately ensuing," and imposed a fine upon every such officer who "should voluntarily and unlawfully obstruct and prevent the choosing of another person to succeed into such office at the time appointed for making another choice."[3] Under the Municipal Corporations Act the provision is, that the mayor shall be elected each year, at the meeting fixed for the ninth of November, and shall "continue in his office for one whole year,"[4] and by an amendment, until his successor shall have accepted the office of mayor, and made and subscribed the requisite oath;[5] and subsequently, the statute of Anne above mentioned was repealed, as being no longer necessary.[6]

§ 157. At *common law*, *the office of an alderman*, jurat, capital burgess, or other member of a select body, *is a franchise for life*, though by prescription or charter it may be limited to a definite period, but the office was so much in the nature of a freehold that there was an implied right to hold over, unless it was otherwise provided.[7] So with respect to recorder, town clerk, and the like officers, the duration of the office depended upon the particular charter, but presumptively it was not lim-

[1] Rex *v.* Atkyns, 3 Mod. 12; Rex *v.* Earle, 1 Str. 627; Mayor of Durhams Case, 1 Sid. 33; Rex. *v.* Thornton, 4 East. 308; Foot *v.* Prowse, 1 Str. 625; S. C. 3 Bro. P. C. 169; Willc. 293; Glover, 173.

[2] *Ib.* Rex *v.* Phillips, 1 Str. 394.

[3] 9 Anne, Chap. XX. Sec. 8.

[4] 5 and 6 Will. IV. Chap. LXXVI. Sec. 49; *ante*, pp. 51, 52, and notes; Reg. *v.* McGowan, 11 A. & E. 869.

[5] 6 and 7 Will. IV. Chap. CV. Sec. 4.

[6] 3 and 4 Vict. Chap. XLVII.

[7] Rex *v.* Doncaster, 2 Ld. Raym. 1564; Foot *v.* Prowse, *supra*,

ited, and their offices were so much in the nature of a freehold that if they are "eligible for a year" and are constituted in general terms, they do not expire with the year, but the possessors are entitled to hold over until others are elected. But it is considered that if they are "eligible for a year *only*," the office *ipso facto* determines on the expiration of the year.[1]

§ 158. In this country, however, a public office is not considered as being in the nature of a grant or contract, and the officer, as against the public, has no freehold or property in the office; and it is almost an invariable provision of law, that all officers shall be elected or appointed for a fixed and definite period. To guard against lapses, sometimes unavoidable, the provision is almost always made in terms that the officer shall *hold until his successor* is elected and qualified. But even without such a provision, the American courts have not adopted the strict rule of the English corporations, which disables the mayor or chief officer from holding beyond the charter or election day, but rather the analogy of the other corporate officers, who hold over until their successors are elected, unless the legislative intent to the contrary be manifested.[2] Thus, in Vermont it is held,—there being no statute to the contrary, and such having been the practice,—that school officers elected at the annual meeting hold over until others are elected at another annual meeting, whether more or less than a year from the time of their election.[3]

[1] Willc. 296, pl. 766; Rex. *v.* Durham, 10 Mod. 147; Dighton's Case, 1 Vent. 82.

[2] People *v.* Runkle, 9 Johns. 147; Slee *v.* Bloom, 5 Johns. Ch. 366, 378; 2 Kent Com. 238; Kelsey *v.* Wright, 1 Root (Conn.), 83; Smith *v.* Nachez Steamboat Co. 1 How. (Miss.) 479; Lynch *v.* Laffland, 4 Coldw. (Tenn.) 96; South Bay, &c. Co. *v.* Gray, 30 Maine, 547; Elmendorf *v.* Mayor, &c. of New York, 25 Wend. 693. And see cases *infra*.

[3] Chandler *v.* Bradish, 23 Vt. 416, 1851.

"The better opinion," says *Shaw*, C. J., *arguendo*, in Overseers of Poor, &c. *v.* Sears, 22 Pick. 122, 130, "is, that town officers *annually* chosen, hold their offices until others are chosen and qualified in their place." School District *v.* Atherton, 12 Met. 105, 1846; Dow *v.* Bullock, 13 Gray, 136, 1859. So in Illinois: People *v.* Fairbury, 51 Ill. 149, 1869. So in Connecticut, an officer elected for "the year ensuing" is, in the absence of any other restrictive provision, entitled to hold beyond the year, and until he is superseded by the election of another person in his place. McCall *v.* Byram

§ 159. The law on this subject has been thus stated by a learned American judge: "Where, in the charter or organic law of a corporation, there is an express or implied restriction upon the time of holding office, as that the officers shall be annually elected on a particular day, and that they shall hold from one charter (election) day till the next, or that they shall be elected 'for the year ensuing *only*,' in such case they *cannot hold over* beyond the next election day or the end of the year." [1] "But where, by the constitution of the corporation, the officers are elected for a term, and until their successors are elected and qualified, or where they are elected 'for the year ensuing,' and the charter or organic law contains no restrictive clause, the officers *may continue to hold* and exercise their offices, after the expiration of the year, until they are superseded by the election of other persons in their places." [2]

Manuf. Co. 6 Conn. 428, 1827, where the authorities are reviewed and commented on by *Hosmer*, C. J.; S. P. Cong. Soc. &c. *v.* Sperry, 10 Conn. 200; Weir *v.* Bush, 4 Litt. (Ky.) 433, where, by statute, an officer holds for a given term, and "until his successor is elected and qualified," he continues in office until his successor is duly elected and qualified, though this (from failure to elect, or from other causes,) be after the expiration of the term. Stewart *v.* State, 4 Ind. 396, 1853; Tuley *v.* State, 1 *ib.* 500, 515; *Ex parte* Lawhorne, 18 Gratt. (Va.) 85.

[1] Tuley *v.* State, 1 Ind. (Cart.) 500, 502, 1849, *per Perkins*, J.; King *v.* Mayor, &c. 6 Vin. Abr. 296; Corporation of Banbury, 10 Mod. 346; Rex *v.* Passmore, 3 Term R. 199; 6 Petersd. Abr. 738. But whether a provision merely that an officer shall "be annually elected on a particular day," is an implied restriction that he shall not hold over, see the cases in Vermont, Massachusetts, New York, Illinois, and Connecticut, above cited. The weight of authority in this country is the other way. Where a city charter gave the mayor power to hold until his successor was elected and qualified, but denied this power to the members of the city council by providing that they should be elected for a specified term, "*and no longer*," and that their seats should be vacated at the end of such term, they cannot hold over, and their action, after the time thus fixed, is void, and does not bind the corporation: Louisville *v.* Higdon, 2 Met. (Ky.) 526, 1859. When the law is silent as to the term, but requires an election to be held every two years, an officer holds over until his successor is provided: Cordiell *v.* Frizzell, 1 Nevada, 130.

[2] *Per Perkins*, J., Tuley *v.* State, 1 Ind. (Cart.) 500, 502, 1849 (action on official bond against sureties). Foot *v.* Prowse, Str. 625; Queen *v.* Durham, 10 Mod. 146; King *v.* Lisle, Andrews, 163; McCall *v.* Manufacturing Company, 6 Conn. 428; 9 *ib.* 536; 10 *ib.* 200; 17 *ib.* 588; Kelsey *v.* Wright, 1 Root, 83; Weir *v.* Bush, 4 Litt. (Ky.) 429; People *v.* Runkle, 9 Johns. 147; Vernon

§ 160. As against the public, however, officers cannot found a valid title or *right to hold over upon their own neglect of duty.* Therefore, where the charter made it the express duty of the trustees in office to give *notice of, and themselves to hold, the annual elections*, it was held, that if they omitted to discharge this duty, though inadvertently, in consequence of which omission there was and could be no election, that they were not entitled to *hold over*, although by the charter it was provided that they should continue in office until a new election should be made and their successors should qualify.[1]

Vacancies in Municipal Offices.

§ 161. At common law there must be *a vacancy* in the office existing *at the time of the election;* "for one cannot," says Mr. Willcock, "be elected to a corporate office in reversion." [2] And the same doctrine has been recognized in this country, and a vacancy must exist before an election to fill it can be ordered,[3] and an election to fill an anticipated vacancy is not

Society *v.* Hills, 6 Cow. 23; Slee *v.* Bloom. 5 Johns. Ch. 366; Pender *v.* King, 6 Vin. Abr. 296; 2 Kent Com. 295, note *b*; Hicks *v.* Launcelot, 1 Rol. Abr. 513; Bank *v.* Petway, 3 Humph. (Tenn.) 522; Stewart *v.* State, 4 Ind. 396; Rex. *v.* Poole, Cas. Temp. Hardw. 23, and Phillips *v.* Wickham, 1 Paige Ch. 590, were considered to have a contrary bearing. It was decided, in Beck *v.* Hanscom, 9 Fost. (N. H.) 213, 222, 1854, that where the charter or incorporating act made no provision for the continuance of corporate officers in office after the expiration of the term for which they were elected, they could not hold over until others should be chosen and qualified: citing the opinion of Chancellor Walworth, in Phillips *v.* Wickham, 1 Paige, 590; but admitting that the People *v.* Runkle, 9 Johns. 147, and Trustees *v.* Hills, 6 Cow. 23, held a different view. In People *v.* Tieman, 8 Abb. Pr. 359, S. C. 30 Barb. 193, the Supreme Court, at special term, denied that the officer himself could hold over unless authorized by statute, though to protect the public his acts are sustained. Cocke *v.* Halsey, 16 Pet. 71.

[1] People *v.* Bartlett, 6 Wend. 422, 1831. In such a case, being trustees *de facto*, their *acts* would be good. And their *title* would also be good except when called in question by *quo warranto*. *Ib.* Lynch *v.* Laffland, 4 Coldw. (Tenn.) 96, 1867. Validity of acts of officers *de facto*: People *v.* Stevens, 5 Hill (N. Y.) 616, *per Bronson*, J.; People *v.* Runkle, 9 Johns. 147; Trustees *v.* Hill, 7 Cow. 23; Plymouth *v.* Painter, 17 Conn. 585; Smith *v.* State, 19 *ib.* 493; People *v.* Bartlett, 6 Wend. 422; State *v.* Jacobs, 17 Ohio, 143; Hinton *v.* Lindsay, 20 Geo. 746.

[2] Willc. Corp. 207, pl. 526; Hob. 150; Skin. 45; Glover, 216.

[3] Lindsey *v.* Luckett, 20 Texas, 516; Biddle *v.* Willard, 10 Ind. 62, 1857; People *v.* Wetherell, 14 Mich. 48.

valid unless expressly authorized by the charter or statute.[1] Elections, however, in advance of the expiration of the regular term of the incumbent of an office, are always provided for and held, but such cases are not elections to vacancies within the meaning of the rule under consideration.

Refusal to Serve in Office.

§ 162. It is an established common law principle, that since a municipal corporation is entitled to the official service of all of its eligible members, it may, by virtue of its inherent or incidental power, pass a by-law imposing a pecuniary penalty upon such as *refuse*, without legal excuse, *an office* to which they have been duly elected.[2] The ground of this doctrine is

[1] Biddle *v.* Willard, *supra.* In this case it was said, that a resignation to take effect at a fixed future time may, if no new rights have attached, be withdrawn, even after acceptance, by the consent of the party accepting; and under the laws of that state it was held, that such a resignation did not create a vacancy which would authorize an election at a period prior to the taking effect of the resignation.

There is no technical or peculiar meaning to the word "vacant," as used in the constitution. It means empty, unoccupied; as applied to an office without an incumbent. There is no basis for the distinction urged, that it applies only to offices vacated by death, resignation, or otherwise. An existing office, without an incumbent, is vacant, whether it be a new or an old one:" *Per Stuart*, J., Stocking *v.* State (vacancy in new judicial circuit), 7 Ind. 326, 1855; followed, Collins *v.* State, 8 *ib.* 344, 1856.

[2] City of London *v.* Vanacker, 1 Ld. Raym. 496; S. C. Carth. 482; S. C. 12 Mod. 272; 1 Salk. 142; Rex *v.* Bower, 2 Dowl. & R. 761, 842; S. C. 1 Barn. & Cress. 587; Vintners Company *v.* Passey, 1 Burr. 239; Willc. 230; Glover, 181; Grant, 221. If of a public and magisterial nature, the penalty for refusal may be imposed, though the person be also liable to be punished by indictment, or, in the discretion of the court, by criminal information: London *v.* Vanacker, 1 Ld. Raym. 499; Rex *v.* Grosvenor, 1 Wils. 18; S. C. 2 Str. 1193; Rex *v.* Hungerford, 11 Mod. 132, 142; Rex *v.* Woodrow, 2 Term R. 732; Rex *v.* Whitwell, 5 Term R. 86; Rex *v.* Leyland, 3 M. & S. 184. The Municipal Corporations Act (5 and 6 Will. IV. Chap. LXXVI., Sec. 51) requires every qualified person elected to the office of alderman, councillor, auditor, or assessor, or mayor, to accept the office or pay a fine to the borough fund. The refusal to take the requisite oaths is a refusal of the office: Exon *v.* Starre, 2 Show. 159. As there is a common law duty to serve in an office to which a person has been duly elected, this duty may, if the office be sufficiently important, be enforced by *mandamus*, and the payment of the fine is not in lieu of service unless the statute or by-law release him from service by treating the penalty as compensation: Rex *v.* Bower, 1

clearly set forth by Lord Holt in Vanacker's Case, and although all of his reasoning is not applicable to our American municipal corporations, still it is believed that under the usual general welfare clause, or under their incidental power to pass reasonable and necessary by-laws, they would be authorized, where such an ordinance did not contravene the charter or statute, or public legislative policy respecting offices, to impose a reasonable fine for refusing corporate offices. In this country, however, offices have not usually been regarded as burdens to be avoided, but, rather, as distinctions to be coveted, and hence there has been little occasion to call into exercise the power of the courts, or to test the authority of the corporations, to enforce the undertaking of their offices. If, under the charter or statute, an officer has the right to resign or lay down his office at pleasure, the authority to impose a fine for refusing to serve would probably not exist.[1]

Resignation of Municipal Offices.

§ 163. An office *may be resigned* either (first) expressly, or (second) by implication.[2] If the charter prescribes the mode in which the resignation is to be made, that mode should, of course, be complied with.[3] Acceptance by the corporation is, at common law, necessary to a consummation of the resignation, and until acceptance by proper authority, the tender or offer to resign is revocable.[4] The right to accept a resignation

Barn. & Cress. 585; S. C. 2 Dowl. & R. 842; Rex *v.* Leyland, 3 Maule & Sel. 186; Rex *v.* Woodrow, 2 Term R. 731. By the above mentioned provision of the Municipal Corporations Act, the fine is in lieu of the acceptance of the office: Grant on Corp. 222.

[1] See Willc. 133, pl. 308; Grant, 221, 222; Gates *v.* Delaware County, 12 Iowa, 405; United States *v.* Wright, 1 McLean, 509; State, &c. *v.* Ferguson, 31 N. J. (2 Vroom) 107.

[2] Regents of University *v.* Williams, 9 Gill. & J. (Md.) 365, 422, 1838; Willc. 132, 238; Grant, 268, 246, note *e; ib.* 221, 222.

[3] Willc. 239; Rex *v.* Hughes, 5 Barn. & Cress. 886, 896; Rex *v.* Mayor of Ripon, 1 Ld. Raym. 563; Rex *v.* Payne, 2 Chitty, 366; Reg. *v.* Morton, 4 Q. B. 146.

[4] Rex *v.* Lane, 2 Ld. Raym. 1304; Rex *v.* Ripon, *supra;* Hazard's Case, 2 Rol. 11; Jenning's Case, 12 Mod. 402; Rex *v.* Patteson, 4 B. & Ad. 9; 1 Nev. & Mann. 612. The acceptance may be by entry in books, by vote, or resolution, or by treating the place as vacant and electing another to fill it, or

is a power incidental to every corporation.[1] It is also a common law principle that the right *to accept the resignation* of an officer is incidental to the power of appointing him.[2] If no particular *mode* is prescribed, neither the resignation nor acceptance thereof need be in writing, or in any form of words.[3]

§ 164. An office may be *impliedly resigned* or vacated by the incumbent being elected to and accepting an *incompatible office.* The rule, says *Parke*, J., in a leading English case on this subject, that where two offices are incompatible they cannot be held together, is founded on the plainest principles of public policy, and has obtained from very early times.[4] The principle applies not only where the second office is the superior and more important one, but also where it is not.[5] The rule has been generally stated in broad and unqualified terms, that the acceptance of the incompatible office by whomsoever the appointment or election might be made, absolutely determined

ordering an election if to be filled by a popular vote: Van Orsdall *v.* Hazard, 3 Hill (N. Y.), 243; State *v.* Ancker, 2 Rich. (South Car.) 245. One elected to an office cannot *resign* it before he has qualified and become an incumbent of it: Miller *v.* Supervisors, &c. 25 Cal. 93; Willc. 236.

[1] Rex *v.* Tidderley, 1 Sid. 14; Hazard's Case, *supra.* The "common council" may regulate resignations by by-laws, and it may accept resignations, as it represents the corporation at large: Rawlinson (5th ed.)., 317, note Staniland *v.* Hopkins, 9 M. & W. 178; Willc. 240, pl. 615.

[2] Van Orsdall *v.* Hazard, 3 Hill (N. Y.), 243; asserting, *arguendo*, the incidental power of municipal corporations, *as such*, to accept resignations, and approving the opinion of Mr. Willcock (Munic. Corp. 240), who observes, respecting the cases on this subject: "I presume that a right to accept a resignation passes incidentally with a right to elect." See, also, Rex *v.* Tidderley, 1 Sid. 14, *per Hale*, Ch. B.; Jenning's Case, 12 Mod. 402; Taylor's Case, Poph. 133.

[3] Same authorities; and see, also, Rex *v.* Ripon, 1 Ld. Raym. 563; S. C. 2 Salk. 433; Regina *v.* Lane, 1 Ld. Raym. 1304; Jenning's Case, 12 Mod. 402; Regina *v.* Gloucester, Holt R. 450; Van Orsdall *v.* Hazard, 3 Hill (N. Y.), 243, 248; State *v.* Allen, 21 Ind. 516, 1863; People *v.* Police Board, 26 N. Y. 316; McCunn's Case, 19 *ib.* 188, distinguished.

[4] *Per Parke*, J., Rex *v.* Patteson, 4 Barn. & Adol. 9, 1832; 1 Nev. & Mann. 612; Regents of the University *v.* Williams, 9 Gill & Johns. (Md.) 365, 1838; 1 Kyd, 369–375.

[5] Milward *v.* Thatcher, 2 Term R. 87, which settled this point conclusively; Rex *v.* Trelawney, 3 Burr. 1615; Gabriel *v.* Clarke, Cro. Car. 138; Rex *v.* Godwin, Doug. 383, note 22; Willc. 240, pl. 617; Glover, 139.

the original office, leaving no shadow of title in the possessor, whose successor may be at once elected or appointed, neither *quo warranto* nor amotion being necessary.[1]

§ 165. The doctrine just stated is undoubtedly true where the acceptance of the second office is made by or with the privity of that authority which has the power to accept the surrender of the first or to amove from it; but "such acceptance does not operate as an absolute avoidance in cases where a person cannot divest himself of an office by his own mere act, but requires the concurrence of another authority to his resignation or amotion, unless that authority is privy and consenting to the second appointment."[2] If one holding an office in a corporation be by that corporation elected to an incompatible office, this, of course, is a consent on the part of the corporation that the first office be vacated, and if the second office be accepted, the first is at once and *ipso facto* determined. But, until acceptance, the former office is not vacated.[3]

§ 166. The rule under consideration is not limited to corporate offices, but extends, both in its principle and application, to all public offices. Thus if a Judge of the Common Pleas accepts an appointment to the King's Bench, the first office is vacated, since it is the duty of the one to correct the errors of the other.[4]

[1] Gabriel *v.* Clarke, *supra;* Verrior *v.* Sandwich, 1 Sid. 305; Milward *v.* Thatcher, *supra;* Glover, 329; Willc. 240, pl. 617.

[2] *Parke,* J., Rex *v.* Patteson, *supra.* It has been held in this country, however, that an incumbent of a public office may lay it down at his pleasure, and that the officer to whom the resignation, by law, is to be made cannot forbid it or refuse it; and that when received by such officer it operates to vacate the office resigned: Gates *v.* Delaware County, 12 Iowa, 405; United States *v.* Wright, 1 McLean, 509. See, however, State, &c. *v.* Ferguson, 31 N. J. (2 Vroom) Law, 107; Lewis *v.* Oliver, 4 Abb. Pr. R. 121; People *v.* Porter, 6 Cal. 26.

[3] *Ib.* Milward *v.* Thatcher, *supra;* Rex *v.* Pateman, *supra:* Willc. 243, pl. 623; Arkwright *v.* Cantrell, 7 Ad. & E. 565. Acceptance necessary: see, also, State *v.* Ferguson, 31 N. J. (2 Vroom) Law, 107, 1864; see Lewis *v.* Oliver, 4 Abb. Pr. 121. Acceptance of an incompatible office, even under a void election, puts an end to the first office, and the officer, on being ousted from the second office, cannot be restored to the first: Rex *v.* Hughes, 5 B. & C. 386; Rex *v.* Bond, 6 D. & R. 333.

[4] Glover on Corp. 139.

Whether offices are incompatible depends upon the charter or statute, and the nature of the duties to be performed.[1] The same man cannot be judge and minister in the same court, and hence the offices are not compatible.[2] Where the recorder is an adviser to the mayor, the two offices cannot be held together.[3]

§ 167. An office may be *vacated by abandonment.*[4] A *voluntary enlistment* by a civil officer in *the military service* of the United States for three years, or during the war, vacates the civil office, being a constructive resignation by abandonment.[5] So where residence within the corporation is necessary in order to be eligible to hold an office, permanent removal from the municipality may undoubtedly be taken as evincing an intention to resign, and as an implied resignation.[6]

Compensation of Municipal Officers.

§ 168. We have had occasion to discuss the *complete supremacy of the legislature* over public corporations, limited only

[1] Milward *v.* Thatcher, *supra, per Buller,* J.; People *v.* Carrigue, 2 Hill (N. Y.), 93, and cases cited; Staniland *v.* Hopkins, 9 M. & W. 178.

Incompatibility in offices exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both. It does not necessarily arise when the incumbent places himself, for the time being, in a position where it is impossible for him to discharge the duties of both offices: Bryan *v.* Cattell, 15 Iowa, 538, 1864, *per Wright,* C. J.; and accordingly that case held that the office of district attorney and of captain in the volunteer service of the United States were not legally incompatible. Two offices are incompatible where the holder cannot, in every instance, discharge the duties of each: *Per Bailey,* J., Rex *v.* Tizzard, 17 Eng. C. L. 193.

[2] Poph. 28, 29; 1 Sid. 305; 2 Keb. 92; Glover, 139.

[3] Willc. 241. pl. 618; Rex *v.* Marshall, cited, 2 B. & A. 341. *Clerk* of a school district *and collector* of the district were held not incompatible, and the same person may, therefore, be appointed to both offices, there being no prohibition in the act: Howland *v.* Luce, 16 Johns. 135, 1819. The offices of *councilman and city marshal* are incompatible: State *v.* Hoyt, 2 Oregon, 246. See, generally, as to incompatible *state and federal offices:* Respublica *v.* Dallas, 3 Yeates (Pa.), 316; S. C. 4 Dall. 229; Commonwealth *v.* Binns, 17 Serg. & Rawle, 219; Commonwealth *v.* Ford, 5 Barr (Pa.), 67.

[4] Willc. 238; State *v.* Allen, 21 Ind. 516, 1863.

[5] State *v.* Allen, 21 Ind. 516, 1863. But see Bryan *v.* Cattell, 15 Iowa, 537.

[6] Willc. 238.

by express constitutional restraints.[1] Its authority over public offices, which are created or authorized solely for the public convenience, is equally great,[2] and may be conferred upon municipal corporations with respect to municipal offices. The legislature, in the absence of constitutional limitation, may create and abolish offices, add to, or lessen, their duties, abridge or extend the term of office, and increase, diminish, or regulate, the compensation of officers at its pleasure.[3]

§ 169. There is no such implied obligation on the part of municipal corporations, and no such relation between them and officers which they are required by law to elect, as will oblige them to *make compensation* to such officers, *unless the right* to it *is expressly given* by law, by ordinance, or by contract.[4] Officers of a municipal corporation are deemed to have accepted their office with knowledge of, and with reference to, the provisions of the charter or incorporating statute relating to the services which they may be called upon to render, and the compensation provided therefor. Aside from these, or some proper by-law, there is no implied assumpsit on the part of the

[1] *Ante*, Chap. IV.

[2] *Ante*, Chap. IV. As to special constitutional restrictions, *ante*, p. 76, Sec. 33; p. 78, Sec. 34.

[3] *Ante*, Chap. IV. and see, also, Conner *v.* Mayor, &c. of New York, 1 Seld. (N, Y.) 285, 1851; affirming S. C. 2 Sandf. S. C. R. 355; Warner *v.* People, 7 Hill, 81; 2 Denio, 272; People *v.* Morrell, 21 Wend. 563, 1839; Phillips *v.* Mayor, &c. of New York, 1 Hilt. (Com. Pl.) 483; Bryan *v.* Cattell, 15 Iowa, 538, 553, *per Wright*, C. J.; Coffin *v.* State, 7 Ind. 157, 1855; People *v.* Mahaney, 13 Mich. 481; Turpen *v.* County Commrs. 7 Ind. 172; Oregon *v.* Pyle, 1 Oregon, 149; Cowdin *v.* Huff, 10 Ind. 83; Cooley, Const. Lim. 276; Butler *v.* Pennsylvania, 10 How. 402; Smith *v.* New York, 37 N. Y. 518, 1868; Swann *v.* Buck, 40 Miss. 268, 1866. While the office is continued, and the officer not removed, he is entitled to salary: Hoke *v.* Henderson, 4 Dev. (N. C.) 1; Cotten *v.* Ellis, 8 Jones (N. C.), Law, 545.

[4] Sikes *v.* Hatfield, 13 Gray, 347, 1859; Barton *v.* New Orleans, 16 La. An. 317; Garnier *v.* St. Louis, 37 Mo. 554, 1866. It is advisable that salaries should be fixed by ordinance, and not voted as a matter of grace and favor: Smith *v.* Commonwealth, 41 Pa. St. 335. Devoy *v.* New York, 39 Barb. 169; Bladen *v.* Philadelphia, 60 Pa. St. 464. See opinion of *Thompson*, C. J., Philadelphia *v.* Given, *ib.* 136. Municipal corporations are not liable for services performed by an officer under an unconstitutional statute: Meagher *v.* County, 5 Nev. 244, 1869.

corporation with respect to the services of its officers. In the absence of express contract, these regulate the right of recovery, and the amount. If the charter or by-laws provide for a peculiar mode of compensation, as, for example, to a city surveyor, for superintending grading of streets, by an assessment upon the property owners, the city is not liable before it collects the money, if it makes the requisite assessments, and is proceeding with proper diligence to enforce them.[1]

§ 170. A municipal corporation *may*, unless restrained by charter, or unless the employment is in the nature of a contract, *reduce or otherwise regulate the salaries and fees* of its officers, according to its view of expediency and right. Although an officer may be elected or appointed for a fixed period, yet where he is not bound, and cannot be compelled to serve for the whole time, such election or appointment cannot be considered a contract to hire for a stipulated term. Ordinances fixing salaries are not in the nature of contracts with officers.[2]

[1] Baker *v.* City of Utica, 19 N. Y. 326; People *v.* Supervisors, 1 Hill, 362; Cumming *v.* Mayor, &c. of Brooklyn, 11 Paige, 596; Jersey City *v.* Quaife, 2 Dutch (N. Y.), 63; Andrews *v.* United States, 2 Story, C. C. 202; United States *v.* Brown, 9 How. 487; Barton *v.* New Orleans, 16 La. An. 395; McClung *v.* St. Paul, 14 Minn. 420, 1869; Smith *v.* Commonwealth, 41 Pa. St. 335. "It is very plain to us that a town officer, *as such*, has no legal claim against the town to recover pay for services rendered, unless by an express vote of the town, or an uniform usage to pay that particular officer from year to year, for his services. And in the latter case, it would be very questionable whether a recovery at law could be had, if it had all along been left to the town to make such compensation as they should deem reasonable, after the services had been rendered. * * * The same principle has always been recognized in this state in regard to all officers. If no law of the state fixed their fees or pay, their services must be gratuitous." *Per Redfield*, J., Boyden *v.* Brookline, 8 Vt. 284, 1836. But the decision (in Boyden *v.* Brookline, 8 Vt. 284,) does not extend strictly beyond *official* services, and when a town agent, acting for the town, or the town itself, employs an attorney at law to prosecute or defend suits against the town, the latter is liable for the services. And the rule is the same if the "town agent," being an attorney, renders for the town professional services, in suits which the proper authorities of the town directed to be instituted: Langdon *v.* Castleton, 30 Vt. 285, 1858.

[2] Commonwealth *v.* Bacon, 6 Serg. & Rawle (Pa.), 322, 1820; followed, Barker *v.* Pittsburg, 4 Pa. St. 49, 1846 (abolishing annual salary of collector of tolls); also, approved: University *v.* Walden, 15 Ala. 655, 1849, but distinguished; Carr *v.* St. Louis, 9 Mo. 190; Comw. *v.* Mann, 5 W. & S. (Pa.) 418;

§ 171. But where the services to be performed are professional or private, rather than public or official, an employment under an ordinance for a fixed time, at a fixed sum for the period, has been held to be a contract, and not subject to be impaired by the corporation. Thus, the appointment or election by a city council, for a *fixed and definite* period, of a city officer—for example, a city engineer, for one year, at the rate of one thousand dollars per year—if accepted by him, constitutes, in the opinion of the Supreme Court of Massachusetts, a contract between him and the city, and the city, in such a case, has no authority, unless expressly conferred, to abolish or shorten the term of office, so as to deprive the officer, without his consent, of the right to compensation for the full period, unless for misbehavior or unfitness to discharge the duties of the place.[1]

Smith *v.* County, 2 Par. (Pa.) 293; Madison *v.* Kelso, 32 Ind. 79; Warner *v.* People, 2 Denio, 272; Conner *v.* Mayor, &c. of New York, 1 Seld. 285, 296. In an action against a city treasurer, on his official bond, for moneys received by him, he cannot charge commissions for the whole term at the rate allowed by law at his accession to office, when his compensation has been changed to a lower rate subsequently: Iowa City *v.* Foster, 10 Iowa, 189; *supra*, Sec. 151. In Commonwealth *v.* Bacon, *supra*, it was held that an ordinance which reduced the salary of the mayor after the commencement of his term, was valid. The court said, "this cannot be considered in the nature of a hiring for a year, because it was not obligatory on the mayor to serve out the year." Though ordinance may fix term and compensation of officer, the office may be abolished, if its abolition be not forbidden, or salary reduced. There is no contract between corporation and officer that the service shall continue, or the salary not be changed: Waldraven *v.* Memphis, 4 Coldw. (Tenn.) 431, 1867; Hoboken *v.* Gear, 3 Dutch. (N. J.) 265, 1859. General power to a corporation to fix the compensation of its officers does not authorize it to take away the fees of an officer, which are *specifically* fixed by the same charter: Carr *v.* St. Louis, 9 Mo. 190, 1845. The legislature may provide that the salary of an officer may be fixed by one board, *e. g.* a common council, though it is payable by another, *e. g.* a county, or board of supervisors, and in that case, the latter have no authority to change it when once fixed: People *v.* Auditors of Wayne, 13 Mich. 233.

[1] Chase *v.* Lowell, 7 Gray, 33, 1856; and see Caverley *v.* Lowell, 1 Allen (Mass.), 289, 1861, as to ordinance constituting a contract with city attorney. These cases, if really distinguishable from the others, should not, it is believed, be extended, but the principle limited to instances where the services are not essentially official in their nature, and where the officer or other party is bound to serve for the fixed and definite period.

A resolution of the council empowering an individual to collect the taxes

§ 172. It is a well settled rule that a person accepting a public office, with a fixed salary, is bound to perform the duties of the office for the salary. He *cannot legally claim additional compensation* for the discharge of these duties, even though the salary may be a very inadequate remuneration for the services. Nor does it alter the case that by subsequent statutes or ordinances his duties are increased and not his salary. Whenever he considers the compensation inadequate, he is at liberty to resign. The rule is of importance to the public. To allow changes and additions in the duties of an office to lay the foundation for extra services, would soon introduce intolerable mischief. The rule, too, should be very rigidly enforced. The statutes of the legislature and the ordinances of our municipal corporations seldom prescribe with much detail and particularity the duties annexed to public offices; and it requires but little ingenuity to run nice distinctions between what duties may, and what may not, be considered strictly official; and if these distinctions are much favored by courts of justice, it may lead to great abuse.[1]

due the city, at a given rate per cent on the amount collected for his compensation, may be repealed or modified at any time by the corporation, on the sole condition that it shall be liable for any compensation earned under the resolution previous to its repeal or modification: Hiestand *v.* New Orleans, 14 La. An. 330, 1859. The court did not regard the resolution as creating a contract, or, if so, it was one of mandate, revocable at the will of the principal: *Ib.*

[1] *Per Potts*, J., in Court of Errors and Appeals, Evans *v.* Trenton, 4 Zabr. (N. J.) 766, 1853. See, also, Andrews *v.* United States, 2 Story, C. C. 202; Palmer *v.* The Mayor, &c. of New York, 2 Sandford (N. Y.), 318; Bussier *v.* Pray, 7 Serg. & Rawle, 447; Angell & Ames on Corp. Sec. 317; Gilmore *v.* Lewis, 12 Ohio, 281.

A *salaried* officer of a public corporation has no claim for compensation *extra* his salary, on the ground that the duties of his office have been increased, or new duties added since the salary was fixed: People *v.* Supervisors, 1 Hill (N. Y.), 362; Wendell *v.* Brooklyn, 29 Barb. 204; Palmer *v.* Mayor, &c. of New York, 2 Sandf. (N. Y.) 318. Special instances, where a claim for compensation, in the absence of express provision, has been sustained, where the law has required a public officer to perform a duty, attended with trouble and expense, clearly *outside* of his regular official duties, see People *v.* Supervisors, 12 Wend. 257; Bright *v.* Supervisors, 18 Johns. 242; Mallory *v.* Supervisors, 2 Cowen, 531; *ib.* 533. This subject is discussed in White *v.* Polk County, 17 Iowa, 413.

Where salary is fixed by ordinance, it cannot be changed by a commit-

§ 173. Not only has an officer, under such circumstances, no legal claim for extra compensation, but a *promise to pay* him an *extra fee or sum* beyond that fixed by law *is not binding*, though he renders services and exercises a degree of diligence greater than could legally have been required of him.[1]

Liability of Corporation to the Officer.

§ 174. Where an officer of a municipal corporation, elected by the people for a specified term, is *improperly removed* by the city council, he may sue the corporation for his salary and perquisites for the time intervening his removal and the expiration of his term.[2] It is a defence to the corporation that the

tee, or individual members of the corporation; nor will their promise to pay extra compensation for the duties of the office be binding on the corporation. But for services performed by request, not part of the duties of his office, and which could as appropriately have been performed by any other person, such officer may, in proper cases, recover a just remuneration: Evans *v.* Trenton, 4 Zabr. (N. J.) 764, 1853. For services required by ordinances, *the city attorney* is entitled to the compensation fixed by ordinance, and no other; and the mayor, by virtue of his duty to see that the "ordinances are duly enforced," cannot bind the corporation to pay more than the fixed salary or compensation, and this duty does not authorize that officer to employ assistant or independent counsel in any case, at the expense of the corporation: Carroll *v.* St. Louis, 12 Mo. 444, 1849. Further, as to liability of city to attorneys, see the chapter on Contracts.

[1] Heslep *v.* Sacramento, 2 Cal. 580 ($10,000 voted to mayor for meritorious services, held void); Hatch *v.* Mann, 15 Wend. 44, reversing S. C. 9 *ib.* 262; approved Palmer *v.* Mayor, &c. of New York, 2 Sandf. 218; Bartho *v.* Salter, Latch, 54; W. Jones, 65; S. C. Lane *v.* Sewell, 1 Chitty, 175; *ib.* 295; Morris *v.* Burdett, 1 Camp. 218; 3 *ib.* 374; Callagan *v.* Hallett, 1 Caines (N. Y.), 104; S. C. Col. & C. Cas. 179; Preston *v.* Bacon, 4 Conn. 471; Shattuck *v.* Woods, 1 Pick. 175; Bussier *v.* Pray, 7 Serg. & Rawle, 447; Carroll *v.* Tyler, 2 Har. & Gill, 54; Smith *v.* Smith, 1 Bailey, 70; Debolt *v.* Cincinnati, 7 Ohio St. 237; Pilie *v.* New Orleans, 19 La. An. 273. The principle operates to deprive a public officer, or an officer of a municipal corporation, of a claim for a reward offered for a service which is embraced in his official or legal duties: Gilmore *v.* Lewis, 12 Ohio, 281, where a constable who arrested a thief was held not entitled to a reward offered by the defendant. S. P. Pool *v.* Boston, 5 Cush. 219. See, *ante*, Chap. VI. p. 134.

[2] Stadler *v.* Detroit, 13 Mich, 346, 1865; Shaw *v.* Mayor, &c. 19 Geo. 468, 1856. The court, in considering the *rule of damages* in such a case, hold that the officer cannot recover of the corporation counsel fees for defending himself against the charges preferred against him, but may recover such "damages as necessarily resulted from his amotion from office, viz:

officer was *legally* removed; but if he was illegally removed, it is no answer to the action that the corporation, in making the removal, acted judicially, and therefore is not liable for the error it committed.[1]

his salary and perquisites:" 19 Geo. 468, *supra.* But the corporation, it is supposed, may recoup the same as individuals who improperly dismiss servants employed for a determinate period: 2 Greenl. Ev. Sec. 261 *a.* See United States *v.* Addison, 6 Wall. 291: Hoke *v.* Henderson, 4 Dev. 1.

[1] Shaw *v.* Mayor, &c. 19 Geo. 468, 1856; Shaw *v.* Mayor, &c. 21 Geo. 280; see, S. C. Mayor, &c. *v.* Shaw's Administrator, 25 Geo. 590. In the case last cited, it was decided that if the removal of a city officer be for a specified cause, not warranting the removal, and the officer sue the corporation for his salary, as a defence to such action it may aver and prove other matters, good in law; to justify such removal. In thus holding, the court say: "If his term of office had not expired when this suit was instituted, and he had moved for a *mandamus* to restore him, instead of bringing an action for his salary, the court would not have interfered, if good cause for his removal could have been shown, although he may have been removed without notice: Rex *v.* Mayor, &c. 2 Cowp. 523; The King *v.* The Mayor, &c. 2 Term R. 182"—*per McDonald,* J., 25 Geo. 590, 592. See Hoboken *v.* Gear, 3 Dutch. (N. J.) 265. An incumbent was appointed by the aldermen and removed by the mayor, who nominated a successor; the incumbent's salary did not cease until his successor was confirmed: White *v.* Mayor, &c. of New York, 4 E. D. Smith, 563, 1855.

Declaring an office and the prospective fees of the officer not to be property, and that the right to fees grows out of *services performed,* it was decided by the Court of Appeals that a municipal officer who had been kept out of his office and had not performed its duties, could not maintain an action against the city to recover the amount of fees accruing from the office: Smith *v.* New York, 37 N. Y. 518, 1868; Hadley *v.* Mayor, 33 N. Y. 603, 607, *per Denio,* C. J.; Wayne County *v.* Benoit, 20 Mich. 176, *Cooley,* J., dissenting. It has, however, several times been decided in California that the *salary* annexed to a public office is *incident to the title* to the office, and not to its occupancy and exercise, and that the right to compensation is not affected by the fact that an usurper, or officer *de facto,* has discharged the duties of the office: Dorsey *v.* Smith, 28 Cal. 21; Stratton *v.* Oulton, *ib.* 44; Carroll *v.* Siebenthaler, 37 *ib.* 193, 1869; approved Meagher *v.* County, 5 Nev. 244, 1869. See Philadelphia *v.* Given, 60 Pa. St. 136, *per Thompson,* C. J.

The legal incumbent of a municipal office rendering service is entitled to compensation until he has actual notice of his removal: Jarvis *v.* Mayor, &c. of New York, 2 N. Y. Leg. Obs. 396. *As to notice:* Field *v.* Commonwealth, 32 Pa. St. 478, 1859; *Ex parte* Ramshay, 83 Eng. C. L. 174, 1852; *Ex parte* Hennen, 13 Pet. 230; Queen *v.* Governors, &c. 8 Ad. & El. 682; Page *v.* Hardin, 8 B. Mon. (Ky.) 648; Bowerbank *v.* Morris, Wall. C. C. R. 118. In The City *v.* Given, 60 Pa. St. 136, the plaintiff acted as city commissioner for some months, when it was decided that he had not been duly elected,

Liability of the Officer to the Corporation and to Others.

§ 175. Public officers, elected pursuant to statute by a municipal corporation, are not the servants or agents of the corporation in such a sense as will enable the *corporation*, in the absence of a statute giving the remedy, to recover *damages against such officers* for negligence in the discharge of their official duty. If the corporation can recover at all in such an action, it can only be for want of fidelity and integrity, not for honest mistakes.[1] To protect the public, however, officers are usually required to give bonds, in which case they are, of course, liable, as we have seen, according to the conditions thereof. By charter, the power to appoint policemen was conferred on a board of police, composed of the mayor and recorders, and this board was authorized to discharge policemen, for cause, and to "decide on all police matters pertaining to appointments, dismissals, &c. *finally and without appeal.*" In an action for wages, brought against the city by a policeman,

and, in a suit brought for his salary, it was held that he could not recover, because he had not qualified by giving security. In an action by the rightful officer on a *supersedeas bond* given in a *quo warranto* proceeding by an intruder, the measure of damages is the full amount of the salary (where the office has a fixed salary) received by the intruder pending the operation of the *supersedeas:* United States *v.* Addison, 6 Wall. 291.

Respecting *liability of an intruder* to the officer *de jure* for salary and fees received, and when an action will lie for money had and received: Glascock *v.* Lyons, 20 Ind. 1; Douglas *v.* State, 31 Ind. 479; Dorsey *v* Smythe, 28 Cal. 21; Stratton *v.* Oulton, *ib.* 44; City *v.* Given, 60 Pa. St. 136; Allen *v.* McKean, 1 Sumn. 117; State *v.* Sherwood, 42 Mo. 179; Hunter *v.* Chandler, 10 Am. Law Reg. (N. S.) 440, and note; Boyter *v.* Dodsworth, 6 Term R. 681; Sadler *v.* Evans, 4 Burr. 1984.

[1] Parish in Sherburne *v.* Fiske, 8 Cush. 264, 266, 1851, opinion by *Dewey*, J.; cites White *v.* Phillipson, 10 Met. 108; Trafton *v.* Alfred, 3 Shepl. 258; Kendall *v.* Stokes, 3 How. 87; Commonwealth *v.* Genther, 17 Serg. & Rawle, 135; Wilson *v.* Mayor, &c. of New York, 1 Denio, 595; Hancock *v.* Hazzard, 12 Cush. 112; Minor *v.* Bank, 1 Pet. (U. S.) 46, 69. Where a surveyor of highways has, by law, a discretion as to the kind of repairs, and exercises his best judgment and acts in good faith, the corporation for which he acts is bound, and cannot defeat his recovery for the price of materials furnished by evidence to show that the repairs were not, in fact, necessary. But it would be otherwise if fraud or corruption were shown: Palmer *v.* Carroll, 4 Fost. (N. H.) 314, 1851. See, also, People *v.* Lewis, 7 Johns. 73; Seaman *v.* Patten, 2 Caines, 312.

who claimed that he had been appointed for a year and dismissed at the end of a month, without good cause, the Supreme Court decided that the board having dismissed the plaintiff for what it deemed sufficient cause, its decision was final, and the sufficiency of the cause of dismissal was not inquirable into in the action.[1]

§ 176. In this country the *officers of municipal corporations are*, in many respects, *public officers*, being charged with duties which concern both the corporation and the public at large. The duties and liabilities of such officers to the corporation fall within the scope of this treatise, and have been considered. But their *individual* rights and their liability to others, upon contracts and for torts, are not, strictly speaking, embraced in the plan of the work. It has, however, been thought, that a brief reference to some of the more important rules and leading adjudications on this subject was desirable, and this has accordingly been done in the note.[2]

[1] Nolan *v.* New Orleans, 10 La. An. 106, 1855.

[2] SUITS.— Public officers have, in general, a *power to sue* commensurate with their duties. If officers of a corporate body, suit should be brought in the *name of the corporation*, unless the statute direct otherwise: Shook *v.* State, 6 Ind. 113; State *v.* Rush, 7 *ib.* 221; Supervisors *v.* Stimpson, 4 Hill, 136, and cases cited; Todd *v.* Birdsall, 1 Cow. 260, and cases cited in note; Jansen *v.* Ostrander, 1 Cow. 670; Cornell *v.* Guilford, 1 Denio, 510; compare Commissioners *v.* Perry, 5 Ohio, 57; Barney *v.* Bush, 9 Ala. 345; Van Keuren *v.* Johnson, 3 Denio, 182. But it has been held, that a public officer cannot, without the aid of a statute, maintain a suit in his own name, although he may have taken a note or contract to himself individually, if the consideration for such note or contract be a liability to the state. The ground of this rule is public policy to discourage public officers from transacting, in their own name, the business of the public: Hunter *v.* Field, 20 Ohio, 340, 1851; Irish *v.* Webster, 5 Greenl. (Me.) 171; Gilmore *v.* Pope, 5 Mass. 491. If the obligation is taken to the officer as agent, or in his official capacity, the action is properly brought in the name of the government beneficially interested: Dugan *v.* United States, 3 Wheat. 172; S. P. United States *v.* Boice, 2 McLean, 352; United States *v.* Barker, 1 Paine, C. C. 152; 2 Parsons on Notes and Bills, 451, and other cases cited. An action by a public officer does not *abate* by the expiration of his term of office. The suit may be continued in his name until its termination, or, by the practice in many of the States, his successor may be substituted: Kellar *v.* Savage, 20 Maine, 199, 1841; Todd *v.* Birdsall, 1 Cow. 260; Haynes *v.* Covington, 13 Sm. & Mar. 408; Grant *v.* Faucher, 5 Cow. 369; Colgrove *v.* Breed, 2 Denio, 125; Manchester *v.* Herrington, 10 N. Y. 164; Upton *v.* Starr, 3 Ind. 538.

Amotion and Disfranchisement.

§ 177. The elementary works treat of Amotion and Disfranchisement together; indeed, formerly, the important dis-

Evidence.— Where the authority of an officer of a public corporation comes incidentally in question in an action in which he is not a party, it is sufficient to show that he was an acting officer, and the regularity of his appointment or election cannot be made a question. Proof that he is an acting officer is *prima facie* evidence of his election or appointment, as well as of his having duly qualified. But if he relies alone on proof of a due election or appointment, such election or appointment must be legally established: Pierce *v.* Richardson, 37 N. H. 306, 1858; Tucker *v.* Aiken, 7 N. H. 113; Johnson *v.* Wilson, 2 N. H. 202; Baker *v.* Shephard, 4 Fost. (N. H.) 212, 1851, and cases cited; Bean *v.* Thompson, 19 N. H. 290; Blake *v.* Sturdevant, 12 N. H. 573; Burgess *v.* Pue, 2 Gill (Md.), 254. An officer, even when justifying, may *prima facie* establish his official character by proof of general reputation, and that he acted as such officer: Johnson *v.* Steadman, 3 Ohio, 94; followed, Eldred *v.* Seaton, 5 *ib.* 215; Berryman *v.* Wise, 4 Term R. 366; Potter *v.* Luther, 6 Johns. 431; Wilcox *v.* Smith, 5 Wend. 233; People *v.* McKinney, 10 Mich. 54. But it is not enough to show that the officer was acting officially in the particular instance in controversy in the case upon trial, and in which his authority is questioned: Hall *v.* Manchester, 39 N. H. 295, 1859. An acting officer is estopped to dispute the validity of his own appointment and election: State *v.* Sellers, 7 Rich. Law, 368; State *v.* Mayberry, 3 Strob. 144.

Acts and Declarations of officers when evidence for or against the corporation: Mitchell *v.* Rockland, 41 Me. 363; Jordan *v.* School District, 38 *ib.* 1864; Morrell *v.* Dixfield, 30 *ib.* 157; County *v.* Simmons, 5 Gilm. (Ill.) 516; Railroad Company *v.* Ingles, 15 B. Mon. 637; Glidden *v.* Unity, 33 N. H. 577; Toll Co. *v.* Betsworth, 30 Conn. 380; Barnes *v.* Pennell, 2 H. of L. Cas. 497. See chapter on Corporate Records and Documents, *post.* The *acts* of the officers of municipal corporations in the line of their official duty, and within the scope of their authority, are binding upon the body they represent, and *declarations* and *admissions* accompanying such acts as part of the *res gestæ*, calculated to explain and unfold their character, and not narrative of past transactions, are competent evidence against the corporation. To render such declarations and admissions evidence, they must accompany acts, which acts must be of a nature to bind the corporate body: Glidden *v.* Unity, 33 N. H. 571, 1856.

Notice.— Where the officers or agents of a public corporation have no powers or duties with respect to a given matter, their individual knowledge, or the individual knowledge of the inhabitants or voters, do not bind or affect the corporation: Harrington *v.* School District, 30 Vt. 155, 1858; Angell & Ames, Corp. Sec. 239; Hayden *v.* Turnpike Co. 10 Mass. 397. The mayor is chief executive officer of the city, and notice to him of a nuisance is sufficient, when it would not be to the clerk, who is only a recording officer, not authorized to act upon the notice: Nichols *v.* Roston, 98 Mass. 39, 1867; *ante*, Secs. 147, 148.

tinction between the two was not observed. Amotion relates alone to *officers;* disfranchisement, to *corporators or members* of

INDICTMENT OF PUBLIC AND CORPORATE OFFICERS.—"A public officer," it is declared in North Carolina, "intrusted with definite powers to be exercised for the benefit of the community, who wickedly abuses or fraudulently exceeds them, is punishable by indictment:" State *v.* Glasgow, North Car. Conf. R. 186, 187 (indictment of secretary of state); State *v.* Justices, &c. 4 Hawks (North Car.), 194 (when county authorities indictable for non-repair of jail); see Paris *v.* People, 27 Ill. 74; State *v.* Commissioners of Fayetteville (non-repair of streets), 2 North Car. Law, 617; *ib.* 633; 2 Murph. 371. But see as to street commissioner: Graffurs *v.* Commonwealth, 3 Pa. (Penn. & W.) 502; State *v.* Commissioners, Walk. (Miss.) 368. Indictment of municipal officers for violation of charter: People *v.* Wood, 4 Park. Cr. R. 144; Hammer *v.* Covington, 3 Met. (Ky.) 494; State *v.* Shelbyville, 4 Sneed (Tenn.), 176; State *v.* Shields, 8 Blackf. 151; Lathrop *v.* State, 6 Blackf. 502; State *v.* Burlington, 36 Vt. 521. *Requisites of indictment* for non-performance of official duty; Waters *v.* People, 13 Mich. 446; State *v.* Mayor, 11 Humph. 217; State *v.* Commissioners, 2 Dev. 345; 3 Chitty, Crim. Law, 586, 606, for precedents of indictments against corporations. *Criminal information* against municipal officers: Willc. Corp. 315–318; Rex *v.* Watson, 2 Term R. 204; *ib.* 198. Indictment against *municipal corporations*: See chapter on Remedies against Illegal Corporate Acts, *post.*

LIABILITY FOR MONEYS RECEIVED.—A public or municipal officer, who is required to account for and pay over money that comes into his hands, is liable, though it be stolen without his fault, unless relieved from this responsibility by statute: Halbert *v.* State, 22 Ind. 125, 1864; Muzzy *v.* Shattuck, 1 Denio, 233; State *v.* Township, 28 Ind. 86; Hancock *v.* Hayard, 12 Cush. 112; United States *v.* Prescott, 3 How. (U. S.) 578; Commonwealth *v.* Coneley, 3 Pa. St. 372: State *v.* Harper, 6 Ohio St. 607. And a direction to a public officer (*e. g.* a county treasurer) how and where to keep the money (*e. g.* in a safe provided by the county), if made by a board or authority having no legal control or power over the matter, will not be a defence to such officer if the money is stolen from the safe: Halbert *v.* State, *supra.* It is no defence to a tax collector to recover moneys received by him,—that he received the money on account of taxes which the legislature had no constitutional power to impose: Waters *v.* State, 1 Gill (Md.), 302, 1843; Thompson *v.* Stickney, 6 Ala. 579; Evans *v.* Trenton, 4 Zabr. 764.

LIABILITY ON CONTRACTS.—Public and municipal officers are not personally liable on contracts within the scope of their authority and line of duty, unless it is very apparent that they intended to bind themselves personally: Macbeth *v.* Haldeman, 1 Term R. 172, and Hodgden *v.* Dexter, 1 Cranch, 145, are the leading cases. The question is, to whom was the credit given?—did the defendant contract in his public or private capacity? See Olney *v.* Wickes, 18 Johns. 122, where the promise was held not personal: Compare King *v.* Butler, 15 Johns. 281; Gill *v.* Brown, 12 Johns. 385; Walker *v.* Swartout, *ib.* 444; Mott *v.* Hicks, 1 Cow. 513; Sheffield *v.* Watson, 3 Caines, 69; commented on, 12 Johns. 448; Brown *v.* Rundlett (full discussion), 15 N. H. 360, 1844, and cases cited and criticized; Belknap

the corporation. Amotion, therefore, is the removal of an officer in a corporation from his office, but it leaves him still

v. Rheinhart, 2 Wend. 375; Adams *v.* Whittlessey, 3 Conn. 560; 8 *ib.* 329; Hammerskold *v.* Bull, *et al.* ("state capitol commissioners") 11 Rich. (South Car.) Law, 493; Lesley *v.* White, 1 Speers, 31; Young *v.* Commisssioners of Roads, 2 Nott & McC. 537; Miller *v.* Ford, 4 Rich. (South Car.) Law, 376; S. C. 4 Strob. 213; Copes *v.* Mathews, 10 Sm. & Marsh. 398; Tucker *v.* Shorter, 17 Geo. 620; Hall *v.* Cockrell, 28 Ala. 507, 1856; but *quære*, as to its correctness. In the absence of a provision to the contrary, an officer of a municipal corporation is not disabled from entering into a contract with it: Municipality *v.* Caldwin, 3 Rob. (La.) 368, 1842. It is held, that where the officers of a public or municipal corporation, acting officially, and under an innocent mistake of the law, in which the other contracting party equally participated, with equal opportunities of knowledge, neither party at the time looking to personal liability, the officers *are not, in such case, personally liable*, nor is the corporation liable: Houston *v.* Clay County (unauthorized contract by township trustees for the erection of a bridge), 18 Ind. 396, 1862; Boardman *v.* Hayne, 29 Iowa, 339, 1870; Duncan *v.* Niles, 32 Ill. 532, 1863, and cases cited; Ogden *v.* Raymond, 22 Conn. 379, 1853; Dameron *v.* Irwin, 8 Ire. Law, 421, 1848; Hite *v.* Goodman, 1 Dev. & Bat. Eq. 364, 1836; Ives *v.* Hulet, 12 Vt. 314, 1840; Stone *v.* Huggins, 28 *ib.* 617; Tucker *v.* Justices, 13 Ire. (Law), 434; Dey *v.* Lee, 4 Jones (Law), 238; Tucker *v.* Shorter, 17 Geo. 620; Copes *v.* Mathews, 10 Sm. & Marsh. 398; Hall *v.* Cockrell, 28 Ala. 507; compare Potts *v.* Henderson, 2 Ind. (Carter) 327, 1850. Liability under statute, of trustees or directors of public works who make unauthorized contracts: Higgins *v.* Livingstone, 4 Dow. 341; Parrott *v.* Eyre, 10 Bing. 283; Wilson *v.* Goodman, 4 Hare, 54.

Tax Collector's Liability to Third Persons.—Tax collector liable in trespass who seizes without color of law for tax assessment, or under an unconstitutional law: McCoy *v.* Chillicothe, 3 Ohio, 370; Ragnet *v.* Wade, 4 *ib.* 107; Loomis *v.* Spencer, 1 Ohio St. 150. But a collector whose warrant is in due form, with nothing on its face to show the illegality of the tax or the want of authority in the assessors or previous officers, will be protected in executing it, even though the tax be not lawfully assessed: Chegary *v.* Jenkins, 1 Seld. (N. Y.) 376, 1851; affirming S. C. 3 Sandf. Sup. Ct. R. 409; Abbott *v.* Yost, 2 Denio, 86; Savacool *v.* Boughton, 5 Wend. 170, 1830, leading case; Downing *v.* Rugar, 21 Wend. 178, warrant of justice to overseers of poor; Alexander *v.* Hoyt, 7 Wend. 89; Clark *v.* Halleck, 16 Wend. 607; People *v.* Warren, 5 Hill, 440; Webber *v.* Gray, 24 Wend. 440; Loomis *v.* Spencer, 1 Ohio St. 153; Little *v.* Merritt, 10 Pick. 547; see Suydam *v.* Keys, 13 Johns. 444; Gale *v.* Mead, 2 Denio, 160; *ib.* 232; Easton *v.* Callender, 11 Wend. 90.

Liability of Public Officers for Acts of Subordinates.—Public officers are not liable for the misconduct or malfeasance of such persons as they are *obliged* to employ, the reason here being, that the maxim of *respondeat superior* has no application, there being no freedom of choice as to the selection and control of agents: Bailey *v.* Mayor, &c. 3 Hill (N. Y.), 531, 1842; affirmed in error, 2 Denio, 433, 1845; Hall *v.* Smith, 2 Bing. 156; Humphreys

a member of the corporation. Disfranchisement is to destroy or take away the franchise or right of being any longer a *mem-*

v. Mears, 1 Man. & Ryl. 187; Bolton *v.* Crowther, 4 Dowl. & Ryl. 195; Harris *v.* Baker, 4 Maule & Selw. 27. See, also: Lane *v.* Cotton, 1 Salk. 17; Story on Agency, 320, *et seq.*; Story on Bail, 300, 302; Martin *v.* Mayor, &c. 1 Hill, 545, 551; Mayor, &c. *v.* Furze, 3 Hill (N. Y.), 612, 618.

Liability of Public Officers for Acts Judicial in their Nature.—Officers are *not liable* for honest errors or mistakes of judgment as to acts within the scope of their authority, *judicial* in their nature, in the absence of malice, or corruption, or statute imposing the liability: Ramsey *v.* Riley, 13 Ohio, 157; Stewart *v.* Southard, 17 *ib.* 402; Conwell *v.* Emrie (road supervisor), 4 Ind. 200; Bartlett *v.* Crozier (highway overseer), 17 Johns. 439; Freeman *v.* Cornwall (highway overseer), 10 *ib.* 470; Johnson *v.* Stanley, 1 Root (Conn.), 245; Township *v.* Carey, 3 Dutch. 377; Waters *v.* Waterman, 2 *ib.* 214; Craig *v.* Burnett, 32 Ala. 728; State *v.* Dunnington, 12 Md. 340; Commissioners *v.* Nesbitt, 11 Gill & J. 50. Liability where the officer's function is *quasi* judicial: Wilkes *v.* Dinsman, 7 How. 89, where the subject is much considered, and malice or wilful wrong held to be essential. The members of a city council are not individually liable, in a civil or criminal action, for acts involving the exercise of discretion, unless they act corruptly; Walker *v.* Hallock, 32 Ind. 239, 1869; Baker *v.* State, 27 Ind. 485. *Public duty*, not ordinarily enforceable by private action against the officer, unless given by statute; Foster *v.* McKibben, 14 Pa. St. 168. *Misapplication of public funds* by officer: Township, &c. *v.* Linn, 36 Pa. St. 431. Neglect to take a *bond* required by law: Boggs *v.* Hamilton, 2 Const. (South Car.) R. 381; State *v.* Dunnington, 12 Md. 340.

Liability for Torts.—Alvord *v.* Barrett (town clerk), 16 Wis. 175; American Print Works *v.* Lawrence, 3 Zabr. 590, 601. *No liability* for acts done by a public officer under lawful authority and in a proper manner: *Ib.* Full discussion and cases cited by *Carpenter*, J.. S. P. in S. C. 1 Zabr. 248, 260, *per Green*, C. J.; Calkins *v.* Baldwin, 4 Wend. 667, and cases cited. How far protected by an *unconstitutional* statute: *Ib.* Liability for *nonfeasance* or *misfeasance*, where the duty is specific, imperative, and not judicial, in its nature: Griffith *v.* Follett, 20 Barb. 620, 1855; Weaver *v.* Devendorf, 3 Denio, 117; Harmon *v.* Brotherson, 1 Denio, 537; *ib.* 595; Adsit *v.* Brady, 4 Hill (N. Y.), 630, 1843. The principle on which a public officer is held personally liable for injuries resulting from improper execution of official duties, is well stated in Nowell *v.* Wright, 3 Allen, 166. In Amy *v.* Supervisors, 1 Wall. 136, 1870, where county supervisors were held to be personally liable for failing to levy a tax, as commanded by the court, to pay the plaintiff's judgment, Mr. Justice *Swayne*, stating the principle of the decision, says: "The rule is well settled, that where the law requires, absolutely, a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct; mistake of duty and honest intentions will not excuse the offender." Liability for *fraud:* Oakland *v.* Carpenter, 13 Cal. 540. A *ministerial officer*, acting in good faith, is liable for actual, but not for exemplary, damages, for illegal acts injurious to private persons:

ber of the corporation.[1] American municipal corporations are, in many respects, essentially different in their constitution from the old English municipal corporations, under which most of the cases on the subject of Amotion and Disfranchisement, usually cited in the books, arose. These cases are often inapplicable here, and should, it is believed, be followed by our courts as precedents with unusual caution, and only when they rest upon or declare principles general in their nature, and which embrace in their operation municipal institutions possessing the distinctive characteristics of ours. Here, the inhabitants of the municipality are the corporators; certain of those inhabitants (usually all of the adult male residents), have the right to elect the legislative or governing body, and also, frequently, the other more important officers of the corporation. It would seem that the English doctrine of *disfranchisement* of a corporator or member has no application to our municipal corporations, whether the corporator be considered the "inhabitant," or the "voter."

§ 178. Whether the power of disfranchisement be *incidental* to the corporation, or must be *expressly conferred*, respecting

Tracy *v.* Swartout, 10 Pet. (U. S.) 80, 1836 (action against collector of customs); *ib.* 137; Jenner *v.* Joliffe, 9 Johns. 382. A provision of law making a civil corporation liable "for the illegal doings and defaults" of its officers (there being no provision that the officers shall not also remain liable) does not deprive the party injured of his right to proceed, personally, against the officer or agent who committed the injury. Both are liable: Rounds *v.* Mansfield, 38 Maine (3 Heath), 586, 1854. *Election officers* for refusing vote, when liable: Gordon *v.* Farrer, 2 Doug. (Mich.) 411; Carter *v.* Harrison 5 Blackf. 138; Jeffries *v.* Ankeny, 11 Ohio, 374; compare Ramsey *v.* Riley. 13 Ohio, 157. See Jenkins *v.* Waldron, 11 Johns. 114; Lincoln *v.* Hapgood, 11 Mass. 350; Bridge *v.* Lincoln, 14 *ib.* 367. *Collection and revenue officers* not liable to the party paying for money voluntarily paid to them: Elliott *v.* Swartout, 10 Pet. 137, 1836; Thompson *v.* Stickney, 6 Ala. 579. When liable in trespass: McCoy *v.* Chillicothe, 3 Ohio, 370; Loomis *v.* Spencer, 1 Ohio St. 153. *Recording officer:* Ramsey *v.* Riley, 13 Ohio, 157; approved, Stewart *v.* Southard, 17 *ib.* 402.

[1] 2 Kyd, 50–94; Willc. 245–276; Glover, Chap. XVI. pp. 327–338; Grant, 250, 263. And see 2 Kent Com. 278, 297, where amotion and disfranchisement are used as convertible terms. Angell & Ames, Corp. Chap. XII. where the cases are very fully collected, and the doctrine of the English decisions satisfactorily presented.

which there is in England some contrariety of view,[1] we need not inquire, for here (were there no constitutional obstacles) the legislature never bestows upon the council or governing body which represents the corporation the right to disfranchise the citizen or corporator, and it is clear that such a formidable and extraordinary authority does not exist, and cannot be exercised by the council, as an incidental or implied right. To burn or destroy the charters of the corporation, or wilfully to falsify its books, were, in England, considered such breaches of duty on the part of a corporator as would work a forfeiture of the corporate character,[2] there being according to Lord Coke, "a tacit condition annexed to the franchise, which, if he break, he may be disfranchised."[3] Surely, there is here no such tacit condition annexed to the right of a resident of a municipality to be and remain a corporator, though there may be a similar condition annexed to municipal offices. Wilfully to destroy or falsify the charter or books of a municipal corporation is an act which is punishable by the criminal codes of the different states, and if the offender is convicted and imprisoned, it may result as an incident of such conviction that he will cease, for the time, to be a resident, and hence, will cease to be a member of the corporation; but the corporation itself has no power to disfranchise him, that is, to deprive him

[1] Grant, 263. "This right [of disfranchisement] has been but sparingly exercised, though it is undoubtedly an *incident* to every corporation, with, perhaps, some exceptions in cases of trading and monetary bodies." *Ib.* Willcock (271 pl. 709) denies that it is an incidental right, and claims that the rule laid down in the second resolution (Bagg's Case) on this point, that "no freeman of any corporation can be disfranchised by the corporation, unless they have authority to do so by the express words of the charter, or by prescription," is the law. Mr. Glover simply adopts Mr. Willcock's language: Glover, 335. Mr. Kyd's exposition of the *second* resolution in Bagg's Case, 2 Kyd, 52. And see leading case of Rex *v.* Richardson, 1 Burr. 517, which was a case of amotion, but has been often taken as asserting an incidental power to disfranchise for cause as well as amove. Angell & Ames, Secs. 408, 409; see generally, Commonwealth *v.* St. Patrick's Society, 2 Binn. 448, 1810; Evans *v.* Philadelphia Club, 50 Pa. St. 107; Hopkinson *v.* Marquis of Exeter, Law Rep. 5 Eq. 63; State *v.* Georgia Med. Soc. Am. Law Reg. (N. S.) 533, Mr. Mitchell's note.

[2] Mayor *v.* Pilkinton, 1 Keb. 597; Rex *v.* Chalke, 5 Mod. 257; 1 Lord Raym. 226; Grant, Corp. 265.

[3] 11 Coke, 98, *a.*

of the privileges and rights, without absolving him from the liabilities of other citizens, while he remains within the limits of the municipality.

§ 179. The power *to amove a corporate officer* from his office, for reasonable and just cause, is one of the common law incidents of all corporations.[1] This doctrine, though declared before,[2] has been considered as settled ever since Lord Mansfield's judgment in the well known case of the *King* against *Richardson*.[3] It is there denied that there can be no power of amotion unless given by charter or prescription; and the contrary doctrine is asserted, that from the reason of the thing, from the nature of corporations, and for the sake of order and government, the power is incidental.

§ 180. But the power to amove, like every other *incidental* power, is incident to the corporation *at large*, and not to any select body or particular part of it, and unless delegated to a select body or part, it must be exercised by the *whole corporation*, and at a *corporate assembly* regularly and *duly convened*.[4]

[1] Rex *v.* Richardson, 1 Burr. 517; Rex *v.* Liverpool, 2 Burr. 723; Rex *v.* Doncaster, 2 Burr. 738; Jay's Case, 1 Vent. 302; Lord Bruce's Case, 2 Stra. 819; Rex *v.* Ponsonby, 1 Ves. Jr.; Rex. *v.* Lyme Regis, Doug. 153; Rex *v.* Tidderly, 1 Sid. 14, *per Hale*, C. B.; Rex *v.* Taylor, 3 Salk. 231; 1 Roll. Rep. 409; S. C. 3 Bulst. 189; Rex *v.* Chalke, 1 Lord Raym. 225; Rex *v.* Heaven, 2 Term R. 772; Reg. *v.* Newbury, 1 Queen's Bench, 751; 2 Kyd, 50–94, where the old cases are digested; Glover, Chap. XVI.; Willc. 246; Grant, 240; Angell & Ames, Chap. XII.; 2 Kent Com. 297.

[2] Lord Bruce's Case, 2 Stra. 819, 820; Tidderley's Case, 1 Sid. 14, *per Hale*, C. B.

[3] Rex *v.* Richardson, 1 Burr. 517 (31 George II.) "It is necessary to the good order and government of corporate bodies that there should be such power [amotion], as much as the power of making by-laws." *Ib.*

[4] Lord Bruce's Case, 2 Stra. 819; Rex *v.* Lyme Regis, Doug. 153; Rex *v.* Richardson, *supra;* Rex *v.* Doncaster, Say. 38; Rex *v.* Taylor, 3 Salk. 321; Rex *v.* Feversham, 8 T. R. 356; Fane's Case, Doug. 153; Willc. 246, pl. 629; Grant, 240, 241; 2 Kyd, 56; Glover, 329; State *v.* Jersey City, 1 Dutch. (N. J.) 536, 1856. Even if the right to elect an officer be in a particular person or select class, the power to amove is not incidental to it, but unless expressly changed or limited by charter, it belongs to the corporation at large Lord Mansfield seemed to be of opinion that it was competent to transfer this power from the whole body to a select body by an ordinance, or by law: Bagg's Case, 11 Co. 99, *a;* Rex *v.* Richardson, 1 Burr. 539. But this question seems not to have been directly determined: Willc. 247, pl. 634; *ib.* 248, pl. 635; State *v.* Jersey City, 1 Dutch. (N. J.) 536.

The power to hold such an assembly is, however, implied in the power of amotion.[1]

§ 181. By the *corporation at large*, as here used, is meant the different ranks and orders which compose it, including the definite and indefinite bodies. The essentials in such a corporation of a valid corporate assembly have elsewhere been described. Our corporations, however, have no ranks, orders, or integral parts corresponding strictly to the constitution of an old English corporation. Here the common council, or the elective governing body (whatever name be given to it), exercises all of the powers of the incorporated place. Has the council, as the representative of the corporation, the incidental powers of a corporation, such as the power to amove, or the power to ordain by-laws? or is the council in the nature of a select body, possessing no right to exercise any of the ordinary incidental powers of the corporation, unless expressly authorized by charter or legislative grant? The question not being judicially settled as to our municipal corporations, the opinion is ventured that, in the absence of an express grant or statute conferring or limiting the power, the common council of one of our ordinary municipal corporations does possess the incidental power not only to make by-laws, but, for cause, to expel its members, and, for cause, to remove corporate officers, whether elected by it or by the people. Whatever necessity or reason exists for the right of amotion at common law with respect to the corporation at large, exists here with respect to that authorized body by which alone the corporation acts, and which exercises all its powers and functions. All of the inhabitants cannot meet and act in their primary capacity, except in organizations like the *towns* in the New England states, and if the right of amotion exist at all, it must be exercised by the council or governing body of the corporation. If it does not exist in the council, it cannot be *delegated* to it by an ordinance or by any act of the corporation, though if the right does exist, its exercise may, of course, be regulated by ordinance or by-law.[2]

[1] Fane's Case, Doug. 153; Rex *v.* Lyme Regis, *ib.* 149.

[2] See, generally, Willard's Appeal, 4 Rh. Is. 597; State, &c. *v.* Trustees, &c. 5 Ind. 89; State *v.* Bryce, 7 Ohio, part II. p. 82; Commonwealth *v.* St. Pat-

§ 182. A provision in a city charter vesting the board of aldermen with the sole power to *try all impeachments of city officers*, the judgment only extending to removal and disqualification to hold any corporate office under the charter, is not unconstitutional as authorizing the exercise of judicial powers by a legislative or municipal body, but is rather the exercise of a power necessary for its police and good administration.[1]

rick's Society, 2 Binn. (Pa.) 448; Commonwealth *v.* Bussier, 5 Serg. & Rawle, 451; Commonwealth *v.* Guardians, &c. 6 Serg. & Rawle, 469; Commonwealth *v.* Sutherland, 3 Serg. & Rawle, 145; Johns *v.* Nicholls, 2 Dall. 184; 1 Yeates, 80; People *v.* Comptroller, &c. 20 Wend. 595; State, &c *v.* Lingo, 26 Mo. 496; Fawcett *v.* Charles, 13 Wend. 473; Hoboken *v.* Gear, 3 Dutch. 265; People *v.* Board of Trade, 45 Ill. 112, 1867; Neall *v.* Hill, 16 Cal. 145; State *v.* Chamber of Commerce, 20 Wis. 63; People *v.* Medical Society, 24 Barb. 570; Evans *v.* Philadelphia Club, 50 Pa. St. 107; State *v.* Georgia Medical Society, 8 Am. Law Reg. (N. S.) 533, and note; Smith *v.* Smith, 3 Desaus. 557. But see State *v.* Jersey City, 1 Dutch. (N. J.) 536, in which the power to expel a member of the council was expressly conferred, but where Mr. Justice *Potts*, delivering the opinion of the court, says:—

"The rule is well settled, that a corporation has, at common law, an inherent jurisdiction to expel a member for sufficient cause." After noticing the offences which will justify expulsion, he adds: "But the jurisdiction in this case is not derived from the common law. The common council is not the corporation, and, whatever powers a municipal corporation may have to amove or expel a member at common law, it is clear that the corporation itself has not, by any by-law, delegated any of them to the common council, and that body, therefore, cannot avail itself of the common law jurisdiction, vested as an inherent right in the corporation itself to expel a member of their own body: 2 Bac. Abr. 21, title *Corporations;* Willc. on Corp. 629. The council derives its jurisdiction from the charter of the corporation." This case rules that where, in express terms, the right of the council to expel a member for certain causes is given, it cannot exercise the power for any other cause. And it would seem to be the opinion of the court, or at least of the judge delivering the opinion, that the common law power of expulsion belonging to a corporation could not be exercised by the common council, that body not being the corporation in which the power is vested.

[1] State *v.* Ramos, 10 La. An. 420. See People *v.* Bearfield, 35 Barb. 254; *supra*, Sec. 139. A board of aldermen sitting in a judicial capacity as a court of impeachment to try charges preferred against a city officer by another branch of the municipal governing body, is a court of limited jurisdiction, and if not sworn, or not sworn by an officer authorized to administer oaths, their proceedings and judgment of guilty are void, and create no vacancy: Tompert *v.* Lithgow, 1 Bush (Ky.), 176, 1866. See Hadley *v.* Mayor, &c. 33 N. Y. 603, cited *infra*, Sec. 191, note.

§ 183. When the terms under which the power of amotion is to be exercised are prescribed, they *must be pursued with strictness.*[1] Whether, if the power to expel or remove be given for certain causes, this excludes the right to exercise the power in any other case, will depend upon the intent of the legislature to be gathered from a consideration of the whole charter or statute. Power to appoint "subject to removal only for," &c., clearly limits the power of removal to the specified causes.[2] Express power of expulsion or removal for specified reasons was, in New Jersey and in Georgia, considered to exclude any implied power, or to limit the right to the enumerated causes.[3]

§ 184. A charter of a municipal corporation gave to the common council express power to "*expel* a member for *disorderly conduct*," and one of the aldermen being guilty of official corruption in receiving bribes, was, after a hearing, expelled from the council. The court was of opinion that the question as to the right to expel for the conduct charged, depended upon the construction of the words "disorderly conduct," and

[1] State *v.* Lingo, 26 Mo. (5 Jones) 496; State *v.* Trustees of University, 5 Ind. 77, 89, 1854; State *v.* Bryce, 7 Ohio, part II. p. 82; State *v.* Chamber of Commerce, 20 Wis. 63; Regina *v.* Sutton, 10 Mod. 76; Paston *v.* Urber, Hutt. 103; Regina *v.* Ricketts, 7 Ad. & El. 966; Regina *v.* Oxford, 6 Ad. & El. 349; Commonwealth *v.* Sutherland, 3 Serg. & Rawle, 145; Commonwealth *v.* Shaver, 3 Watts & S. 338. In the Queen *v.* Sutton, *supra*, so strictly was a clause in a charter conferring the right of removal construed, that it was held that where acts were to be done by a *majority*, that word was to be understood as a majority of the whole corporation, and that if the officer whose removal was proposed was a member, it could be effected only by a majority of all the members, including himself, and that his personal interest did not exclude him from voting as a member upon the question. See, also, State *v.* Jersey City, 1 Dutch. (N. J.) 536; Madison *v.* Korbly, 32 Ind. 74; State *v.* McGarry, 21 Wis. 496, where "other cause" for removal was held to mean "other *like* cause."

[2] People *v.* Higgins, 15 Ill. 110.

[3] State *v.* Jersey City, 1 Dutch. 536, 1856; The Mayor, &c. *v.* Shaw, 16 Ga. 172, 1854. See S. C. 19 *ib.* 468; 21 *ib.* 280; 25 *ib.* 590. But see Commonwealth *v.* St. Patrick's Society, 2 Binn. 441; 4 *ib.* 448; Angell *v.* Ames, Sec. 415. Under the Illinois statute, it is held that the *county* authorities do not possess general powers of removal, and that they cannot remove a treasurer elected by the people, except for causes specified in the statute; but it may be observed that a county treasurer is not a corporate officer: Clark *v.* The People, 15 Ill. 213, 1853.

it held that receiving bribes for his official influence and votes was *disorderly conduct*, within the meaning of the charter.[1] In another case, the charter authorized the council "to dismiss the marshal for malpractice in office, or neglect of duty;" and it was held that the council could not remove this officer for the crime of gambling, as this was neither malpractice in office, nor official neglect, within the meaning of the charter.[2]

§ 185. The power to *expel* a member of the council does not authorize a resolution by it that "the president of the council be directed not to appoint a certain member on any committee, nor call his name, nor allow him to take part in the action of the board," since this would create no vacancy which could be supplied, but would leave the seat occupied, while it silenced the occupant, and left his constituents unrepresented.[3]

§ 186. The expulsion of a member of the common council does *not disqualify* him from being *re-elected* to the same office, unless it is expressly so provided by the charter, for where the law annexes a disqualification to an offence, it does so in terms. Hence, if a member having been expelled, even for bribery, be re-elected, he cannot be expelled a second time for the same identical act for which he had before been expelled.[4]

§ 187. It was held in a case in Rhode Island that a clerk of a school committee,—an officer created by the school law, and necessary to the organization and legal action of the com-

[1] State *v.* Jersey City, 1 Dutch. (N. J.) 536, 1856.

[2] Mayor *v.* Shaw, &c. 16 Ga. 172, 1854.

[3] State *v.* Jersey City, 1 Dutch. (N. J.) 536, 1856. Whether, pending proceedings to expel, a member can be *suspended* from his duties, was a question not determined in the case; but in the State, &c. *v.* Lingo, 26 Mo. 496, 1858, it was held that the power to provide for *removing* from office corporate officers gives the power to *suspend* from office during the investigation of the charges for which the suspension was made. The court say, "The power to remove necessarily includes the minor power to suspend." *Ib.* 499.

[4] State *v.* Jersey City, 1 Dutch. (N. J.) 536, 1856. If the common council, without authority, suspend a member from the duties of his office, *mandamus* is a proper remedy to restore him to the exercise of his legal rights. *Ib.* Willc. on Municipal Corporations, 368, pl. 74, 75; *ib.* 377, pl. 96; 3 Blacks. Com. 110; Rex *v.* Barker, 3 Burr. 1266; Angell & Ames on Corporations, Sec. 702, 706.

mittee,—may, after an election by the committee, be removed from office by the committee, but only for cause, as the statute gives no express power to remove, and after due notice and opportunity given him to defend himself upon the charges presented.[1]

§ 188. Where an officer is *appointed during pleasure*, or where *the power* of removal *is discretionary*, the power to remove may be exercised *without notice or hearing*. But where the appointment is *during good behavior*, or where the removal can only be for certain *specified causes*, the power of removal cannot, as will presently be shown, be exercised, unless there be a charge against the officer, *notice* to him of the accusation, and *a hearing* of the evidence in support of the charges, and an opportunity given to the party of making defence.[2]

[1] Willard's Appeal, 4 (Rh. Is.) 595, 597, *per Ames*, C. J., who says, "such a power with regard to such an officer, unless expressly forbidden by law, is incidental to the committee as necessary to enable it duly to perform its functions:" *Ib.* p. 601. It is sufficient cause for the removal of such a clerk, that he refuses to produce papers which belong to the body which elected him, and of which he is simply the custodian, or refuses to keep or amend the records when duly ordered to do so. *Ib.*

[2] Field *v.* Commonwealth, 32 Pa. St. 478, 1859; *Ex parte* Ramshay, 83 Eng. Com. Law, 174, 189, 1852; *Ex parte* Hennen, 13 Pet. (U. S.) 230; Queen *v.* Governors, &c. 8 Ad. & El. 682; Bagg's Case, 11 Coke, 98 (6); Rex *v.* Coventry, 1 Ld. Raym. 391; Dr. Gaskin's Case, 8 T. R. 209; Rex *v.* Oxford, 1 Salk. 428; Rex *v.* Mayor, &c. 1 Lev. 291; 2 Kyd, 58, 59; Willc. 253, 254; Grant, 244; Rex *v.* Andover, 1 Ld. Raym. 710; Page *v.* Hardin, 8 B. Mon. 648; Hoboken *v.* Gear, 3 Dutch. 265; Madison *v.* Korbly, 32 Ind. 74, 1869; Stadler *v.* Detroit, 13 Mich. 346, 1865. As to the *removal*, by the appointing power, of officers, the duration of whose term is not fixed, see People *v.* Comptroller, &c. 20 Wend. 595; Commonwealth *v.* Sutherland, 3 Serg. & Rawle, 145; Field *v.* Girard College, 54 Pa. St. 233.

It is the law in England, as applied to the old corporations, that causes which *disqualify* the person to be an officer will not authorize the corporation to amove him, but he must be ousted by *quo warranto*. The reason given is, that one so disqualified is not, in law, a corporate officer, and hence, cannot be amoved as such by the corporation: Rex *v.* Doncaster, Say. 40; Buller, N. P. 203; Rex *v.* Lyme Regis, Doug. 85; Symmers *v.* Regem, Cowp. 502; Willc. 259, pl. 669; *ib.* 281, pl. 728. And see Fawcett *v.* Charles, 13 Wend. 473, 1835. It has elsewhere been shown, that with us, the councils of municipal corporations are often made judges of the qualifications of their members and officers, and this may modify or change the rule above mentioned, which seems to rest on narrow and technical grounds.

§ 189. In the leading case of the *King* against *Richardson*, the point was decided, as above mentioned, that a corporation, in the absence of an express grant of authority, had the incidental power to make a by-law to remove officers for *just cause*. Lord Mansfield, in that case, classified the offences which would justify the exercise of the power; and his judgment therein has been followed both in England and in this country, in cases arising in private corporations not of a pecuniary character. According to Lord Mansfield, there are three sorts of offences for which an officer or corporator may be discharged: 1. Such as have *no immediate relation to his office*, but are themselves of so *infamous* a nature as to render the offender unfit to execute any public franchise. 2. Such as are only against his oath and *the duty of his office as a corporator;* and amount to breaches of the tacit condition annexed to his franchise or office. 3. Offences of a *mixed nature* — as being an offence not only against the duty of his office, but also a matter indictable at the common law.[1] In offences of the *first* class the removal can only be made *after* there has been a previous conviction in a court of law; and an amotion will not be sustained by a subsequent conviction.[2] In offences of the *second* class the corporation may *try*, and if the charge is established, remove, without any previous or other proceedings in the

[1] Rex *v.* Richardson, 1 Burr. 517, 538, 1758; followed, Rex *v.* Liverpool, 2 *ib.* 723. So, also, in Commonwealth *v.* St. Patrick's (Benevolent) Society, 2 Binn. 441, 1810; Commonwealth *v.* Guardians, &c. 6 Serg. & Rawle, 469, 1821. These cases adopt Lord Mansfield's classification, and assert the inherent power of corporations to expel for offences falling within any of the three classes. See, also, Butch. Benef. Ass. 35 Pa. St. 151; 38 *ib.* 278; Evans *v.* Philadelphia Club, 50 Pa. St. 107; Society, &c. *v.* Commonwealth, 52 Pa. St. 125.

The courts may, by *mandamus*, compel a corporation to amove an officer; and the result of the cases on this point is considered to be that where the offence of the officer is such that the corporation has the *power* to amove, the court will only compel it to do so where some one is injured by the omission to remove; but where it is *required* to amove, or the office is declared by the charter or statute to be void if such an act be done or omitted, there the court will compel it to amove, though no one be shown to have been aggrieved: Rex *v.* Truro, 3 Barn. & Ald. 592; Rex *v.* West Looe, 5 Dowl. & R. 416; Rex *v.* Totness, *ib.* 483; Grant on Corp. 243, and note.

[2] Rex *v.* Richardson, *supra*, and cases cited in last note.

courts.[1] In offences of the *third* class the English judges have differed on the point whether the officer may or may not be removed before a conviction in a court of justice. The principal cases and the result on this point are briefly stated in the note.[2]

§ 190. Principle and sound policy require that the *implied power of removal* for offences against the corporation be restricted to acts of a serious nature directly affecting the rights and interests of the corporation,[3] causes for removal have, in

[1] Rex *v.* Richardson, *supra;* Commonwealth *v.* St. Patrick's Society, *supra,* and cases cited in preceding note.

[2] Rex *v.* Carlisle, Fortesc. 200; S. C. 11 Mod. 379. In this case the corporation, before conviction, amoved a capital citizen for giving a bribe to a freeman and offering him another to influence his vote at the election for a mayor. The court's judgment was in favor of the right to amove. Although there might have been a previous conviction, yet this being a great offence against the *duty of his office,* the corporation might amove without a conviction. In Rex *v.* Derby, Cas. Temp. Hardw. 155, Lord Hardwicke mistook the above case on this point, and inclined to think there ought to be a previous conviction. And such seemed also to be the inclination of *Holt,* C. J., in Rex *v.* Chalke, Comb. 397, where the removal was before conviction, for criminally razing entries in the corporation books which were at first proper, but the point was not decided. In Haddock's Case, T. Raym. 439, the amotion was for riotously assembling and assaulting several corporators, thereby impeding the business of the corporation. It was considered that the offence was two-fold: one against the duty of his office as a corporator: the other (wholly disconnected) of a riot. And as he might be guilty of one and yet be acquitted the other, the corporation might amove without conviction, and the case is said to be different from that of Chalke (*supra*), for there the officer could not have been guilty of the offence at law without at the same time having been guilty of a breach of his duty. The cases decided are considered to favor this view, viz: if the act is criminal and single in its nature, so that a conviction or acquittal in the courts of law will necessarily determine the guilt or innocence of the party, there must be a conviction, but otherwise there may be a removal without, or independent of, a conviction: Buller's N. P. 206; Willc. 249, 250, 251, 252; Glover, 331, 338; Grant, 240; 2 Kyd, 88–94, where the prior cases are digested and stated. Lord Mansfield, in Rex *v.* Richardson, 1 Burr. 538, leaves the point untouched. A removal for a riot in the council chamber, without a previous conviction, is said to have been held good: Rex *v.* Yates, Style, cited 8 Mod. 101. See, further: Earle's Case, Carth. 173; Rex *v.* Wells, 4 Burr. 1999; Regina *v.* Newberry, 1 Q. B. 751; 2 Bac. Abr. (Bouv. ed.) 476, and cases cited.

[3] Evans *v.* Philadelphia Club, 50 Pa. St. 107; Butch. B. Ass. 35 Pa. St. 151; 38 *ib.* 278; Society, &c. *v.* Commonwealth, 52 Pa. St. 125; Commonwealth *v.* Philadelphia Society, 5 Binn. 486; State *v.* Common Council, 9 Wis. 254; Mayor, &c. *v.* Geisel, 19 Ind. 344; Same *v.* Wright, *ib.* 346.

some instances, been held sufficient in England which would not, probably, be so regarded in this country. The principal English cases are given in the note. The sufficiency and reasonableness of the cause of removal are questions for the courts.[1]

[1] Rex *v.* Andover, 3 Salk. 229. *Poverty* of alderman, so that he could not *pay taxes*, sufficient cause for amoving him: *Ib;* but not applicable here. But *bankruptcy* insufficient cause of amotion of councilman: Rex *v.* Liverpool, 2 Burr. 723; see Rex *v.* Chitty, 5 Ad. & E. 609. *Total desertion of duties* of office sufficient cause: Buller's N. P. 206; Rex *v.* Richardson, 1 Burr. 541. *When absence and non-attendance* upon meetings, and *neglect of duty*, will be sufficient cause: See Rex *v.* Richardson, *supra;* Rex *v.* Wells, 4 Burr. 2004; 1 Hawk. P. C. Chap. LXVI. Sec. 1, as to official neglect of duty; approved by Lord Mansfield, in case last cited; Lord Bruce's Case, 2 Stra. 819, and notes; Rex *v.* Ipswich, 2 Ld. Raym. 1233; S. C. Salk. 443; Buller's N. P. 206, 207; Lord Hawley's Case, 1 Vent. 146; Rex *v.* Harris, 1 Barn. & Ad. 936; Queen *v.* Mayor, &c. of Pomfret, 10 Mod. 107; 2 Kyd, 65, *et seq.*, where the older cases are stated; Willc. 255–264; Angell & Ames, Sec. 427, giving summary of English cases. Much depends upon the cause of the neglect, and whether the effect is to obstruct or hinder the business of the corporation or officer from being done.

Habitual drunkenness, disqualifying from the performance of duty, is a sufficient cause to remove an alderman or officer charged with magisterial functions: Rex *v.* Taylor, 3 Salk. 231; 1 Rolle, 409; 3 Bulst. 190. But *casual intoxication*, or being drunk by accident, is not a sufficient cause, for the reason (charitably allowed) that this is likely to happen to the best: Rex *v.* Taylor, *supra*, A. D. 1616. *Old age* is insufficient: Bac. Abr. Corp. E. 9; Hazard's Case, 2 Rolle, 11.

Mere threats or *attempts*, no injury resulting, not sufficient: Bagg's Case, 11 Coke, 93. *Insulting language*, or *libel* upon mayor or officers, held insufficient, on the ground that personal offences are to be punished by law, and not by the corporation: Rex *v.* Oxford, Palm. 455; Bagg's Case, 11 Coke, 93, 96, 97, 98, 99; Clark's Case, 2 Cro. 506; Buller's N. P. 203; Rex *v.* Lane, Fortesc. 275; S. C. 11 Mod. 270; Earle's Case, Carth. 174; Willc. 261, pl. 680. See Regina *v.* Rogers, 2 Ld. Raym. 777; Innes *v.* Wylie, 1 Carr. & P. 257; Regina *v.* Treasury, 10 Ad. & E. 374; 2 Perr. & D. 498.

Official misconduct, amounting to misdemeanor, has been before mentioned, and the cases cited. The misconduct must, it seems, specially relate to the execution of the office: Rex *v.* Wells, 4 Burr. 1999; see Regina *v.* Newberry, 1 Q. B. 751. If the same person hold *two offices*, misconduct with respect to one will authorize removal from that one, but not from both; but if the offence is against the duties of both, the removal may be from both: Rex *v.* Chalke, 1 Ld. Raym. 226; S. C. 5 Mod, 257; Rex *v.* Doncaster, 2 Ld. Raym. 1566; S. C. 1 Barnard. 265; Rex *v.* Wells, 4 Burr. 1999; Rex *v.* Harris, 1 B. & Ad. 936. Misemployment of corporate funds in his custody is not sufficient cause of amotion, though generally it is good cause of suspension from a financial office, for the court will not grant a *mandamus* to

§ 191. Respecting the *proceedings to amove*, it has already been observed, that they must be had by and before the *authorized body duly assembled*, in conformity with the rules on that subject, which are elsewhere stated.[1] The proceeding in all cases where the amotion is for cause, is adversary or judicial in its character; and if the organic law of the corporation is silent as to the mode of procedure, the substantial principles of the common law as to proceedings affecting private rights must be observed.[2]

§ 192. And *first*, the officer is entitled to a *personal notice* of the proceeding against him and of the time when the trial body will meet. It is not necessary that the notice, citation, or summons set out the charges in detail, but it should contain the

restore until the accounts are made up and submitted to the corporation: Rex *v.* Chalke, 1 Ld. Raym. 266; S. C. 5 Mod. 259; Rex *v.* London, 2 Term R. 182; Willc. 262, pl. 685; Angell & Ames, Sec. 428. On principle, it may be suggested that if such a thing as an implied power of amotion exists at all, it should extend to a case where the financial officer of a corporation is misemploying its funds intrusted to his safe-keeping.

[1] Rex *v.* Taylor, 3 Salk. 231; Rex *v.* Sandys, 2 Barnard. 301; Taylor *v.* Gloucester, 1 Roll. 409; S. C. 3 Bulst. 190; Rex *v.* Chalke, 1 Ld. Raym. 226; 2 Kyd, 57; Grant, 245, 275; Willc. 264; pl. 691; *ib.* 266; pl. 698. Necessity for vote or corporate act, declaring the removal or expulsion: Commonwealth *v.* Pennsylvania, &c. Institute, 2 Serg. & Rawle, 141; Commonwealth *v.* German Society, 15 Pa. St. 251; Stadler *v.* Detroit, 13 Mich. 346.

Where, by statute, the mayor, recorder, and an alderman were constituted a body to try charges against policemen appointed by the corporation, with power to suspend or remove, the presence of the mayor is essential to the constitution of the legal body, and if one act, in the trial of such a charge, as mayor, who is not such *de jure* [or *de facto*], the order of removal is void: Hadley *v.* Mayor, &c. 33 N. Y. 603; see *supra*, Sec. 182. Special provision of charter construed to give the power of removal to the mayor and council, and not to the council alone: Charles *v.* Hoboken, 3 Dutch. (N. J.) 203.

[2] State *v.* Bryce, 7 Ohio, Part II. pp. 414, 416, 1836. "This proceeding," (amoval of a trustee of the university) "is essentially adversary; the justice of the common law permits no investigation of facts which may be followed by a loss of a right or by the infliction of a penalty, to be conducted *ex parte*." *Ib. per Lane*, J. Murdock *v.* Academy, 12 Pick. 244; State *v.* Trustees, &c. 5 Ind. 77. Charter mode, if prescribed, must be pursued: *Ib.* Bacher's Case, 20 Pa. St. 425; see People *v.* Bearfield, 35 Barb. 254; State *v.* Common Council, 9 Wis. 254; Madison *v.* Korbly, 32 Ind. 74; Tompert *v.* Lithgow, 1 Bush (Ky.), 176, 1866.

substantial fact that a proceeding to amove is intended.[1] The analogies of the ordinary procedure in the courts of the state (in the absence of statute or by-law) may be followed respecting such details as the notice or summons, mode of service, &c. Notice may be *dispensed with:* 1st. By appearance and answer to the charges.[2] 2d. By a total desertion of the place,[3] so that it is not practicable to give the notice, as where the officer has permanently, not temporarily, left the municipality and resides constantly elsewhere with his family. Though he may have been absent or left the borough, yet if he return and be in the place at the time of the amotion, he is entitled to notice.[4] If the amotion be for good cause, such as conviction of an infamous crime,[5] or the repeated declaration of the officer that he would not discharge the duties of his office,[6] while it would be more regular to give the notice, yet its omission will not entitle him to a *mandamus* to be restored; for if restored he could be amoved again, and the courts will not order a restoration where they can see that there is good ground of removal, and that the order to restore would be without practical and useful effect.[7] With these exceptions, the party

[1] Queen *v.* Saddlers Co. 10 House of Lords Cases, 404; State *v.* Bryce, *supra*. Rex *v.* Richardson, 1 Burr. 540; Rex *v.* Doncaster, 2 Burr. 738; see 1 B. & Ad. 942; Rex *v.* Liverpool, 2 Burr. 731; Bagg's Case, 11 Rep. 99 *a;* Rex *v;* Wilton, 5 Mod. 259; Exeter *v.* Glyde, 4 Mod. 37; Rex *v.* Ipswich, 2 Ld. Raym. 1240; Willc. 264, 265; Innes *v.* Wylie, 1 C. & K. 257; South P. R. Co. 5 Ind. 165; People *v.* Benevolent Society, 24 How. Pr. 216; Delacey *v.* Neuse, &c. Co. 1 Hawks, 274; Commonwealth *v.* Pennsylvania Benef. Institute, 2 Serg. & Rawle, 141; Society *v.* Vandyke, 2 Whart. 309.

[2] Willc. 264; Rex *v.* Wilton, 2 Salk. 428; Rex *v.* Ipswich, 2 Ld. Raym. 1240; Rex *v.* Feversham, 8 Term R. 356; Rex *v.* Carmathen, 1 Maule & Sel. 697; S. P. Commonwealth *v.* Pennsylvania Benef. Institute, 2 Serg. &. Rawle, 141.

[3] Willc. 265, 266; Grant, 245; Rex *v.* Harris, 1 B. & Ad. 936; Rex *v.* Shrewsbury, Cases Temp. Hardw. 151; 7 Mod. 202; Rex *v.* Toneboy, 2 Ld. Raym. 1275; 11 Mod. 75; Rex *v.* Grimes, 5 Burr. 2601; Rex *v.* Leicester, 4 Burr. 2089.

[4] Rex *v.* Leicester, 4 Burr. 2089.

[5] Angell & Ames, Corp. Sec. 422, where this opinion is expressed: Grant, 265; Rex *v.* Chalke, 1 Ld. Raym. 226.

[6] Rex *v.* Axbridge, Cowp. 523; see 2 Term R. 182; Grant, Corp. 245.

[7] Rex. *v.* Griffiths, 3 B. & Ald. 735; see Blagrave's Case, 2 Sid. 6, 49. 72; Rex *v.* Rowe, 1 Show. 188; S. C. Carth. 199; Grant, Corp. 245. If one

is entitled to notice of the intention to amove, so that he may have full and fair opportunity to be heard in his defence.

§ 193. There must be *a charge*, or charges, against him, *specifically stated*, with substantial certainty; yet the technical nicety required in indictments is not necessary.[1] And *reasonable time and opportunity* must be given to answer the charges and to produce his testimony; and he is also entitled to be heard and defended by counsel, and to cross-examine the witnesses, and to except to the proofs against him.[2] If the charge be not denied, still it must be examined and proved.[3] Where the specific charge stated is insufficient to justify the removal, or where the removal is erroneous and no good and sufficient ground therefor appears, the officer is entitled to a *mandamus to restore him.*[4] But where the proceedings are in conformity with the charter, and are regular, the sentence will not be inquired into collaterally, nor its merits examined by *mandamus* or action.[5]

irregularly amoved for good cause be restored by *mandamus*, he may be again amoved by regular proceedings *de novo:* Taylor *v.* Gloucester, 3 Bulst. 190; Rex *v.* Ipswich, 2 Ld. Raym. 1283. In such case the office is vacated from the time of the second amotion; the proceedings do not relate back to the former irregular amotion: Willc. 269, pl. 707.

[1] Tompert *v.* Lithgow, 1 Bush (Ky.), 176, 1866; Rex *v* Lyme Regis, Doug. 174; Bagg's Case, 11 Co. 99 *a;* S. C. 1 Roll. 225; Glover, 334; Willc. 267.

[2] State *v.* Bryce, 7 Ohio, Part II. p. 414, 1836; Rex *v.* Richardson, 1 Burr. 540; Rex *v.* Liverpool, 2 Burr. 734; Murdock *v* Academy, 12 Pick. 244 where the requisites of a valid proceeding to amove are stated; Rex *v.* Chalke, 1 Ld. Raym. 226; Rex *v.* Derby, Cas. Temp. Hardw. 154.

[3] Rex *v.* Feversham, 8 Term R. 356; Harman *v.* Tappenden, 1 East, 562; Willc. 267; Glover, 334; Murdock *v.* Academy, 12 Pick. 244. A municipal officer, when removed by the corporation appointing him, is entitled to actual notice of his removal, and to compensation until he receives such notice: Jarvis *v.* Mayor, &c. of New York, 2 N. Y. Leg. Obs. 396.

[4] Rex *v.* Ipswich, 2 Ld. Raym. 1240; Madison *v.* Korbly, 32 Ind 74, 1869; Commonwealth *v.* German Society, 15 Pa. St. 251, 1850; State *v.* Jersey City, 1 Dutch. (N. J.) 536. The restoration puts him in the same situation that he was before the attempted removal: Willc. 269.

[5] Society, &c. *v.* Commonwealth, 52 Pa. St. 125, 1866; People *v.* Bearfield, 35 Barb. 254. Though the amotion be illegal, the officers who took part in it are not *personally liable*, unless both malice and want of probable cause be shown: Harmen *v.* Tappenden, 3 Espin. 278; S. C. 1 East, 555; Ferguson *v.* Earl of Kinnoul, 9 Cl. & F. 289. *Jurisdiction* as to the *election* and *amotion* of

§ 194. If the amotion be *legal and authorized*, the office becomes *ipso facto vacant* from the time the amotion is declared, and another person may be elected or appointed to fill it. If the removed officer afterward continues to act he is a mere usurper, and may be ousted on *quo warranto* and punished. Amotion from one office does not, of course, affect the party's title to another.[1]

officers in corporations, when not changed by statute, belongs to the Common Law Courts and not to Equity: Attorney General *v.* Earl Clarendon, 17 Ves. 491; Dyer *v.* 332; Cochran *v.* McCleary, 22 Iowa, 75. *Ante*, Sec. 141.

[1] Jay's Case, 1 Vent. 302; Symmers *v.* Regem, Cowp. 503; Willc. 268, pl. 704; Rex *v.* Doncaster, 2 Ld. Raym. 1566; 1 Barnard. 265; Rex *v.* Chalke, 1 Ld. Raym. 226. Mr. Willcock, 268, pl. 704, whose language is adopted by Glover (Corp. 334), states that, if a person legally amoved continues to act, he is a mere usurper, and that "all corporate acts in which he has concurred are equally void, as though he had never been elected or admitted." But if he is permitted to act after amotion, it would probably be considered, in this country, that his acts would, as to third persons, be valid, like those of an officer *de facto*. If the removal be unauthorized, Mr. Willcock states the rule to be, "that all corporate acts in which he has concurred between the moment of his removal and restitution are of equal validity as if he had never been amoved," &c.: Willc. 269, pl. 707. If he was regularly present and concurred, it can well be seen how this should be so; but his concurrence when not regularly acting, or when a *de facto* successor has taken his place and is acting, would not seem to alter the legal quality of the act. In this country, the acts of *de facto* officers are everywhere considered valid as respects the public.

CHAPTER X.

Corporate Meetings.

§ 195. The subject of Corporate Meetings will be considered under the following general heads: —

1. Common Law Requisites of a Valid Corporate Meeting —Secs. 196–199.

2. Notice of Corporate Meetings at Common Law and Under the English Municipal Corporations Act—Secs. 200–203.

3. New England Town Meetings; Requisites of Notice and Power of Adjournment—Secs. 204–207.

4. Constitution and Meetings of Councils, or of Select Governing Bodies, and herein of Quorums and Majorities; Of Integral Parts; and of Stated, Special, and Adjourned Meetings —Secs. 208–225.

5. Mode of Proceeding when Convened—Secs. 226–230.

Common Law Requisites of a Valid Corporate Meeting.

§ 196. As respects their mode of action, municipal corpotions in this country are of *two general classes.* In the one, as in the organization of *towns* in the New England states, heretofore adverted to, all of the qualified inhabitants meet, act, and vote, *in person.*[1] In the other, which is the kind that prevails generally throughout the states, and even in many of the larger places in New England, the affairs of the town or city are administered by a *select or representative body*, usually denominated the Council, and which is elected by the qualified voters of the incorporated place, not assembled together in a meeting, but at an election, where each elector votes separately and by ballot.[2]

[1] *Ante*, Chap. II. p. 34, Sec. 11.

[2] *Ante*, Chap. II. pp. 34-42; *ante*, Chap. IV.

§ 197. The latter class of corporations are properly municipal. The former class are not so strictly municipal as they are public in their character.[1] Where there is a *council* or *governing body*, the inhabitants or voters, in their natural capacity, have no power to act for or bind the corporation, but the corporation must act, and can be bound only, through the medium of this body. Therefore, authorized acts done by the council are not their acts, but those of the corporation. The council is a body which is constantly changing; it is simply the agent of the corporation. But its members, it has been well observed, are not only not *the* municipal corporation, but are not even *a* corporation.[2] Whether the corporation be of the one class or the other, *its affairs must be transacted at a corporate meeting*, in the one case of the qualified inhabitants, and in the other of the members of the council or governing body, duly convened at the proper time and place, and upon due notice in cases where notice is requisite.[3]

§ 198. In England, prior to the General Municipal Corporations Act of 1835,[4] the *requisites of a valid corporate meeting* depended upon the constitution of the particular corporation under its charter or prescriptive usage. To constitute a *corporate assembly* there must, *at common law*, be present, the mayor or other head officer (he being considered an *integral part* of the corporation,[5] in whose absence no valid corporate act could be done), a *majority* of the members of each select or definite class (these classes being also considered integral parts), and *some members* of the indefinite body (indefinite in point of numbers) usually styled the commonalty, and of each of the indefinite classes if there were more than one.[6] If there were

[1] *Ante*, Chap. I. p. 28, Sec. 9; *ante*, Chap. II. p. 30, Sec. 10, and note.

[2] Regina *v.* Paramore, 10 Ad. & El. 286; see Regina *v.* York, 2 Queen's B. 850; Mayor *v.* Simpson, 8 Queen's B. 73. *Ante*, p. 56, Sec. 19.

[3] Dey *v.* Jersey City, 19 N. J. Eq. 412, 1869; Baltimore *v.* Poultney, 25 Md. 18, 1866.

[4] *Ante*, Chap. III. pp. 47–52.

[5] *Ante*, Chap. III. p. 46, Sec. 16. Further as to mayor, see *ante*, Chap. IX. relating to Municipal Elections and Officers.

[6] Willc. 52, 53, 66; Rex *v.* Atkyns, 3 Mod. 23; 1 Rol. Ab. 514; Rex *v.* Carter, Cowp. 59; Rex *v.* Smart, 4 Burr. 2243; Rex *v.* Gaborian, 11 East, 87, note; Rex *v.* Morris, 4 East, 26; Rex *v.* Bellringer, 4 Term R. 823; Rex *v.* Miller, 6 *ib.* 278; Rex *v.* Varls, Cowp. 250; Rex *v.* Monday, *ib.* 539.

no indefinite class, and the governing body consisted of a select or definite class, the common law requisite of a valid corporate assembly is, that a majority of the select class must be present, and if there was more than one such class, then a majority each of the select classes of which the corporation is constituted; and the presence of the mayor at a select assembly of this kind is not necessary, unless it is expressly required.[1] But where a common council exists (which, in contemplation of the ancient law, is a meeting of the body at large, or those of them who thought proper to attend, or were considered by their fellow freemen the men best fitted to attend), though such council has become a select or definite class, there the presence of the mayor or head presiding officer is necessary to a valid assembly, though such presence be not required by the charter.[2]

§ 199. A *majority of each definite part* means a majority of the number of members of which that part consists, not merely a majority of the existing members of the part; but if the act is to be done by an indefinite body alone, it is valid if done at a meeting duly convened, although but a small fraction of the whole body at large be present. But while the presence of a majority of each definite integral part was necessary to a valid corporate meeting, yet it is settled law that a majority of those present, when legally assembled, will bind the rest.[3] Not only did the law of the old corporations in England require the presence of a majority of the members of each definite integral

[1] See authorities cited in the last note.

[2] Willc. 67.

[3] Rex *v.* Bellringer, 4 Term R. 810, 1792, and cases cited; Rex *v.* Miller, 6 *ib.* 268; Rex *v.* Monday, Cowp. 531, 538; Rex *v.* Devonshire, 1 Barn. & Cress. 609; Rex. *v.* Bower, *ib.* 492; Rex *v.* May, 4 B. & Ad. 843; Rex *v.* Headley, 7 Barn. & Cress. 496; Willc. 216, pl. 546; Blacket *v.* Blizard, 9 Barn. & Cress. 851; *Ex parte* Rogers, 7 Cow. 526, 1827; *ib.* note *a*, 764; *Ex parte* Willcocks, 7 Cow. 402, and note 462, 463, 1827; Young *v.* Buckingham, 5 Ohio, 485, 489, 1832; Buell *v.* Buckingham, 16 Iowa, 284, 1864, and cases cited; State *v.* Deliesseline, 1 McCord (South Car.), 52, 1821; State *v.* Huggins, Harper (South Car.), 94, 1824; Baker *v.* Young, 12 Gratt. (Va.), 303, 1855, approving Willc. 216. pl. 546; Labourdette *v.* Municipality, 2 La. An. 527, 1847; Kingsbury *v.* School District, 21 Met. 99, 1846; Damon *v.* Granby, 2 Pick. 345, 355, 1824; Coles *v.* Trustees, &c. of Williamsburg, 10 Wend. 658, 1833; 2 Kent Com. 293; Angell & Ames, Corp. Sec. 501.

part, but it went to the extreme length of holding that where the presence of the mayor was necessary, he must be the *legal* mayor, and if he be merely an officer *de facto*, and afterwards be ousted on *quo warranto*, all corporate acts done under the sanction of his office are voidable.[1] By reason of the change in the constitution of municipal corporations in England, wrought by the Corporations Act of 1835, many of the rules respecting corporate meetings are no longer applicable, though, as we shall see, some of them still are. Under that statute the corporation acts, and can only act, through the council; and it is provided that all questions shall be decided by a majority of the councillors present, including questions of adjournment; that one-third part of the number of the whole council shall be a quorum; that the mayor, if present, shall preside, and if absent, that a presiding officer shall be chosen, who shall have a second or casting vote.[2]

Notice of Corporate Meetings at Common Law, and under the English Municipal Corporations Act.

§ 200. Due *notice of the time and place of a corporate meeting* is, by the English law, essential to its validity, or its power to do any act which shall bind the corporation. Respecting notice, the courts in England adopted certain rules, which, since they form the basis of much of the statute law in this country upon the subject, and have in the main, been followed by our courts, and are founded on reason, may advantageously be here mentioned. All corporators are presumed to know of the days appointed by the charter, statute, usage, or by-laws, for the transaction of particular business, and hence, no notice of such meeting for the transaction of *such* business is necessary, or for the transaction of the mere ordinary affairs of the corporation on such days, yet if it is intended to proceed to any other act of importance, a notice is necessary, the same as at any other time.

[1] Rex *v.* Carter, Cowp. 59; Rex *v.* Hebden, Anstr. 391; Rex *v.* Dawes, 4 Burr. 2279; Willc. 54, 55.

[2] 5 and 6 Will. IV. Chap. LXXVI. Sec. 69. Rawlinson on Corp. (5th ed.) 136. *Ante*, Chap. III. pp. 47–52.

§ 201. A notice, when necessary, must, if practicable, be given to *every member* who has a right to vote, where the act is one to be done by a body consisting of a definite class or classes, and it must be given by, or *issued by order* of, some one who has the authority to convene a corporate meeting. But notice may be altogether *dispensed with*, or its necessity *waived*, by the presence and consent of *every one* of those entitled to it. It must be *served* personally upon *every* resident member, or left at his house. If temporarily absent, it may be left with his family, or at his house or last place of abode. An order to serve all is not sufficient; all, if practicable, must be served, but if the party entitled to notice has entirely quit the municipality, and has no family or house within its limits, notice is not necessary. It must be served a *reasonable time before* the hour of meeting, of which the court will judge from all the circumstances, including usage.

§ 202. The notice must state *the time* of meeting, and the *place*, if it be not the usual place. It is not necessary to state what business is to be done when the meeting relates only to the ordinary affairs of the corporation; but when it is for the purpose of electing or removing officers, passing ordinances, and the like, the fact should be stated, so that members may know that something more than the usual routine of business will be transacted. Such great importance is attached to notice, that it can only be waived by universal consent; but if every member of a select body be present at a regular or stated meeting, or at a special meeting, they may, if *every one* consents, but not otherwise, transact any business, ordinary, or extraordinary, though no notice was given, or an insufficient notice, but the unanimity of consent should plainly appear from their recorded declaration, acts, or conduct. This unanimity is only necessary to enter upon the business; once commenced, the usual rules which govern the body and its actions apply. It is to be observed that the foregoing rules are not applicable where they are in conflict with the charter, and hence, if this requires a *special notice*, it cannot be waived, even by consent of all. The guildhall is the proper place for the meeting; if there be none, the meeting should be at the usual place; and if at any other

place, it should be stated, to prevent fraud or surprise. Acts done at an unusual place will be closely scrutinized.[1]

§ 203. By the English Municipal Corporations Act,[2] the subject of meetings, stated and special, and the notice and summons required are made matter of express regulation. It provides for every borough or city four quarterly meetings of the council in each year, to be held at a fixed date. No *notice* of the *business to be transacted* at these quarterly meetings is necessary; but three days *notice*, by posting on or near the town hall, is required of the time and place of every intended meeting. Power is given to the mayor to call special meetings, or, on his refusal, to five members of the council, in which case, the notice on or near the door of the town hall shall state therein the business proposed to be transacted at such meeting, and in every case, a summons (in addition to the notice) must be left at the usual place of abode of every member of the council, or at the premises occupied by him, in respect of which he is enrolled as a burgess, at least three clear days before the meeting, and no business can be transacted not specified in the summons. Power to adjourn meetings is expressly conferred upon the council by the same section.[3]

[1] Authorities in support of the last and two preceding sections of the text: Willc. Chap. I. Sec. 42, *et seq.*: Rex *v.* Hill, 4 B. & C. 441; Rex *v.* Liverpool, 2 Burr. 734; Rex *v.* Doncaster, *ib.* 744; Rex *v.* Theodorick, 8 East, 545; Rex *v.* May, 5 Burr. 2682; Rex *v.* Oxford, Palm. 453; Rex *v.* Grimes, 5 Burr. 2601; Kynaston *v.* Shrewsbury, 2 Stra. 1051; Musgrove *v.* Nevison, 1 Stra. 584; S. C. 2 Ld. Raym. 1359; Rex *v.* Mayor of Shrewsbury, Cases Temp. Hardw. 147; Smith *v.* Darley, 2 House of Lords Cases, 789; Grant on Corp. 154–156; Glover on Corp. Chap. VIII. pp. 146–173. Formerly, the rule that where notice was necessary every member must be notified, was applied only to the case of definite bodies, but it has more recently been declared to be applicable, both to select and indefinite bodies of public corporations: Rex *v.* Langhorne, 4 Ad. & El. 538. See, also, Rex *v.* Faversham, 8 Term R. 356, *per* Ld. Kenyon, *arguendo*.

[2] 5 and 6 Will. IV. Chap. LXXVI. Sec. 69. *Ante*, pp. 47–52.

[3] In construing this statute, it has been held that where the meeting is an adjourned quarterly meeting, notice is necessary as to any business which was not actually entered upon at the general or regular quarterly meeting, but not otherwise; and hence, a coroner cannot be elected at such an adjourned quarterly meeting without the notice and summons which the statute requires: Regina *v.* Grimshaw, 10 Queen's Bench, 747, 755.

New England Town Meetings — Notice and Adjournment.

§ 204. In *New England* the inhabitants are required to be notified or warned of *town meetings*. The requisites of such notice, and manner of giving it, are prescribed by statute. The provision is quite general, that the articles or *matters to be acted upon shall be specified* or inserted in the notice or warrant. The courts in those states concur in requiring the statute as to notice to be faithfully observed by the officers charged with the duty of calling meetings. Meetings, to be valid, must be warned or notified according to law. The rule of the English courts applied to indefinite corporate bodies, that if all are present notice may, by unanimous consent, be waived,[1] is not regarded as applicable to the town meetings of New England, and hence a *de facto* meeting, not duly notified, though attended by all the voters capable of attending, is not a valid meeting, and its acts are void.[2]

See Regina *v.* Thomas, 8 Ad. & El. 183; Rex *v.* Harris, 1 B. & Ad. 936. As to notice: Town Council, &c. *v.* Court, 1 E. & E. 770; Regina *v.* Whipp, 4 Queen's Bench, 141.

[1] Rex *v.* Theodorick, 8 East, 545; *ante*, p. 34, Sec. 11.

[2] Hayward *v.* School District, 2 Cush. 419, 1848; Moor *v.* Newfield, 4 Greenl. (Maine) 44, 1826; School District *v.* Atherton, 12 Met. 105, 1846; Little *v.* Merrill, 10 Pick. 543; Perry *v.* Dover, 12 Pick. 206; Reynold *v.* New Salem, 6 Met. 340; Congregational Society *v.* Sperry, 10 Conn. 200; Rand *v.* Wilder, 11 Cush. 294, 1853; Stone *v.* School District, 8 Cush. 592; Brewster *v.* Hyde, 7 N. H. 206; Northwood *v.* Barrington, 9 N. H. 369; Giles *v.* School District, 11 Fost. 304; Lander *v.* School District, 33 Maine, 239, 1851; Jordan *v.* School District, 38 Maine, 164, 1854. So in Vermont it has been decided that it cannot be shown, by parol, to validate the *levy of tax* by a meeting not legally warned, that *all* of *the legal voters* of the district were present at the meeting: Sherwin *v.* Bugbee, 17 Vt. 337, 1845; distinguished by the court from Rex *v.* Theodorick, 8 East, 543. And see, also, Hunt *v.* School District, 14 Vt. 300; Pratt *v.* Swanton, 15 Vt. 147. A *tax* voted at a meeting not legally warned is illegal, and may be recovered back if the party did not pay it voluntarily: Rideout *v.* School District, 1 Allen (Mass.), 232, 1861. So it may be recovered back if the assessment is *void:* Gerry *v.* Stoneham, 1 Allen (Mass.), 319, 1861; Tobey *v.* Wareham, 2 Allen (Mass.), 594. See Massachusetts act of 1859, Chap. CXVIII. limiting, in such cases, the plaintiff's right of recovery to illegal *excess* of taxation.

Authority to the clerk *to call* and warn "the annual meetings," does not authorize him to call and warn special meetings; and the acts and doings of a special meeting thus called are wholly void: School District *v.* Ather-

§ 205. It is, however, sufficient if the *purpose or object* of the meeting *can fairly be understood* from the notice or warrant.[1] And where the statute requires the *time and place* to be stated in the notice, its requirements must be observed, and there can be no legal meeting unless it originally assembles at the prescribed time and place. The law is strictly held as to the important particulars of time and place, as will appear by the illustrations in the notes.[2]

ton, 12 Met. 105, 1846. And authority "to warn" future meetings does not authorize him "to call" such meetings: Stone *v.* School District, 8 Cush. 592, 1851.

As to *proof of notice*, and the return of the person or officer making the warning, and what it shall show, see State *v.* Williams, 25 Maine, 564, 1846, and the Massachusetts and Maine decisions therein cited and commented on; Christ's Church *v.* Woodward, 21 Maine (13 Shep.), 172, 1846; Fossett *v.* Bearce, 29 Maine, 523, 1849; Bearce *v.* Fossett, 34 Maine, 575, 1852; Jordan *v.* School District, 38 Maine, 164, 1854; Perry *v.* Dover, 12 Pick, 206; Houghton *v.* Davenport, 23 Pick. 235; Williams *v.* Lunenberg, 21 Pick. 75; Briggs *v.* Murdock, 13 Pick. 305; Rand *v.* Wilder, 11 Cush. 294, 1853; Cardigan *v.* Page, 6 N. H. 182; State *v.* Donahay, 1 Vroom (N. J.), 404; Hardcastle *v.* The State, 3 Dutch. (N. J.) 352. In Sherwin *v.* Bugbee, 17 Vt. 337, the strict view is held that the *notice* or warning *must be recorded* by the clerk. If, as recorded, the *time* for which the meeting was to be holden is not specified, the defect cannot be supplied by parol evidence, that in the original warning the hour for the meeting was named. This decision was not put upon the ground that the statute expressly required the warning to be recorded (which it did not), but upon the ground that the statute intended that the records should furnish all the means for testing the validity of the proceedings. See, also, Stevens *v.* Society, &c. 12 Vt. 688, 1839. Presumption in favor of legality of meeting after lapse of long time: Peterborough *v.* Lancaster, 14 N. H. 382, 392. Length of notice: Hunt *v.* School District, 14 Vt. 300; Pratt *v.* Swanton, 15 *ib.* 147.

Under a statute of New York, the notice it required of school meetings held to be *directory* only, and the want of notice, when not fraudulently or wilfully omitted, does not render the meeting invalid, and its proceedings void: Marchant *v.* Langworthy, 6 Hill (N. Y.), 646; affirmed in error, 3 Denio, 526. See, also, Williams *v.* Larkin, 3 Denio, 114.

[1] School District *v.* Blakeslee, 13 Conn. 227.

[2] Sherwin *v.* Bugbee, 16 Vt. 439, 444, 1844. In reference to town meetings, the statute of Vermont requires that the notice shall be in writing, and shall "specify the business to be done, and the *time and place* of holding said meeting." Referring to this statute, *Redfield*, J. (in Sherwin *v.* Bugbee, *supra*), says: "We have no doubt *the place* of holding the meeting must be definitely specified. It would hardly do to warn a meeting to be held at *some* place in the district, or at a designated village, or at one of two or more dwelling houses. So, too, in regard to *time*, there seems to be a

§ 206. Where the statute requires the notice "*to specify the business to be done*," an omission to comply with this requirement makes the meeting void, and it is held that a notice stating, generally, "to do any proper business," is insufficient, and the acts and votes of a meeting held under it are of no binding or legal force.[1] Indeed, the rule is general that where the statute requires the business to be stated in the warrant or notice, this is absolutely essential, and the meeting must be confined to those matters.[2]

propriety in having it definitely fixed. If the day, only, is named, the question immediately arises, shall the inhabitants be required to attend the whole day? or, when can the meeting transact the business for which they meet, so as to bind the absent members? The fact that the meeting adjourned to another day and hour, will not help the matter, on the obvious principle that the adjourned meeting could have no more authority than the original meeting, which was void."

Where it appears that a meeting was held on the day appointed, it will be presumed that it was held at a suitable time in the day, and pursuant to the notice. A meeting should be opened within a reasonable time after the hour specified; but what is such reasonable time, depends upon circumstances: School District *v.* Blakeslee, 13 Conn. 227. Where a meeting was called *at* a certain school house, it was held to mean within the walls of the building. An assemblage of some of the citizens in the highway *near* the school house, and an adjournment to another place, is not a legal meeting, and its transactions are not binding, though the school house was locked, and the weather cold and no fire in the building: Chamberlain *v.* Dover, 13 Maine, 466, 1836. See, also, Haines *v.* School District, 41 Maine, 246, 1856; Kingsbury *v.* School District, 12 Met. 99, 1846.

[1] Hunt *v.* School District, 14 Vt. 300, 1842; Sherwin *v.* Bugbee, 16 Vt. 439; S. C. 17 *ib.* 337, 444, 1844. "Such meetings are void for all purposes of transacting business not specified" in the written notice required by the statute: *Ib. per Redfield*, J.

[2] *Ib.* Johnson *v.* Wilson, 2 N. H. 202; Tucker *v.* Aiken, 7 N. H. 113; Baker *v.* Sheperd, 4 Fost. 208.

By-laws passed at a town meeting not duly warned (as, for example, where the notice did not "specify the objects" of the meeting as required by statute), are void: Hayden *v.* Noyes, 5 Conn. 391, 1824; Willard *v.* Killingworth, 8 *ib.* 247. The party claiming under a by-law must show it was passed at a meeting duly warned: 8 Conn. 247, *supra*. And must, perhaps, show all the essentials of its validity, such as due passage, publication, &c.: *Ib.*

Where the statute requires that all matters to be acted upon at the meeting shall be inserted in the warrant or notice, a failure to do this will avoid as to both parties any contract that may be made, or any act that may be done, with respect to a matter not embraced in the warrant or notice:

§ 207. At a meeting duly constituted and organized, a majority of the members, electors, or corporators present, in the absence of any statute either conferring or denying the power, have the implied incidental corporate right *to adjourn* the meeting to another time, either on the same or to a future day, and, if fairly done, to another place within the corporate limits.[1]

Cornish *v.* Pease, 19 Maine (1 Appl.), 184, 1841; Spear *v.* Robinson, 29 Maine (16 Shep.), 531, 1849; Little *v.* Merrill, 10 Pick. 643; Blackburn *v.* Walpole, 9 Pick. 97; Torrey *v.* Millbury, 21 Pick. 64; *ib.* 75; Hasdell *v.* Hancock, 3 Gray, 526; Jones *v.* Andover, 9 Pick. 146, 1829; Kingsbury *v.* School District, 12 Met. 99, 1846; Rand *v.* Wilder, 11 Cush. 294, 1853. But if the matter is embraced, and the meeting duly met, it is no objection to its action that it was had near the close of the meeting, and when a portion of the voters had retired: Bean *v.* Jay, 23 Maine (10 Shep.), 117, 1843. Subsequent legal meeting may *ratify* acts of previous meeting not duly notified: Jordan *v.* School District, 38 Maine, 164. By participating in a meeting illegally called, a party is not estopped to deny its legality: School District *v.* Atherton, 12 Met. 105.

[1] Chamberlain *v.* Dover, 13 Maine (1 Shep.), 466, 1836; People *v.* Martin, 1 Seld. (N. Y.) 22, 1851; Hubbard *v.* Winsor, 15 Mich. 146; Kimball *v.* Marshall, 44 N. H, 465, 1863; Goodell *v.* Baker, 8 Cowen, 286. Electors exclusive judges of necessity of adjournment of town meeting, and such adjournment to next day, and at another place, in the town twenty miles distant, was considered lawful: *Ib.* The statute provided that if at any annual town meeting no place is fixed by the electors for the next annual town meeting, such town meeting shall be held at the place of the last annual town meeting: 1 R. Sts. N. Y. 340, Sec. 3. Held, in People *v.* Martin, 1 Seld 22, that though the place of meeting was thus contingently fixed by *statute*, the electors, being duly assembled, might adjourn it for the residue of the day to *another* place in the town. Concluding his opinion in this case, *Paige*, J., well remarks: "I confess that I have had some difficulty in coming to this conclusion, and I think the power [which is decided to exist] of adjourning a town meeting to another time and place may, under peculiar circumstances, be oppressively exercised, and lead to a defeat of the popular will. This power ought not to be exercised except in a case of extreme necessity:" 1 Seld. 27.

After a *valid adjournment*, acts by a portion of the voters who remain are invalid: Kimball *v.* Lamprey, 19 N. H. 215. In Massachusetts, an *adjournment* of a meeting should appear *of record*, and parol evidence of an adjournment to another day is held to be inadmissible: Taylor *v.* Henry, 2 Pick. 397, 1824. See State *v.* Jersey City, 1 Dutch. (N. J.) 309, and chapter on Corporate Records and Documents, *post.* The *statute of New York* (1 R. Sts. 342) only requires the town meeting to be kept open during the day time, or some part thereof, but not that it shall be kept open during the whole and every part of the day, between the rising and setting of the sun: People *v.* Martin, 1 Seld. (N. Y.) 22, 1851.

Constitution and Meetings of Councils or select governing bodies; and herein of Quorums and Majorities, of Integral Parts, and of Stated, Special, and Adjourned Meetings.

§ 208. Unlike the towns of New England, in which all the qualified voters meet and act in their primary capacity, the *councils* of cities and towns are representative bodies, the number of whose members is fixed by law, and they are elected by the legal voters of the incorporated place. This council is the governing body of the municipal corporation, and the corporation, unless it is otherwise provided, can act and be bound only through the medium of the council.[1] The charter or constituent act of the place usually contains provisions as to the constitution of the council, its stated and special meetings, and the notice thereof requisite to be given. how many shall constitute a quorum, and an enumeration of its powers. The usual scheme of the organization of the council is to divide the territory of the incorporated place into districts or wards, the voters in each of which elect one or more representatives annually, called aldermen, or councilmen, and these when duly convened, constitute the council, over which the mayor or head executive officer of the corporation presides, sometimes constituting a member of the council, and in other instances, having power to vote only when there is a tie, or to give a second vote in case of a tie.[2]

§ 209. The doctrine of the English courts as to the old corporations in that country, that the *mayor was an integral part* of the corporation, whose presence, unless otherwise provided in the charter, was necessary to a valid corporate meeting; that during a vacancy in the office of mayor, the corporation could do no valid act, unless expressly empowered, except to elect another, and thus complete the body, and that the acts of the corporation under the presidency of any other than a mayor

[1] Central Bridge Corp. *v.* Lowell, 15 Gray, 106, 116, 1860, where an act affecting a city was, by its terms, to take effect on acceptance by the city, it was held that the acceptance might be made by the governing body. *Ib.*

[2] Power to preside and give casting vote at meetings of a religious corporation construed: People *v.* Rector, &c. 48 Barb. 603.

de jure, were voidable, has it is believed, no application to the office of mayor in the corporations of this country.[1]

§ 210. The *right of the mayor* or other officer to *preside* over the meeting of the council is a *franchise*, and may be tested by an information in the nature of a *quo warranto*,[2] but cannot be determined, at least, ordinarily, unless by statute provision, on a bill in chancery to enjoin, or in any other indirect or collateral proceeding.[3]

[1] *Infra*, Sec. 222; Welch *v.* Ste. Genevieve, 1 Dillon, C. C. 130, 1871. And see, *ante*, Chap. IX. as to powers and duties of the mayor.

The presiding officer of a town meeting, with statute authority to maintain order, may make a valid order, though it be by parol only, for the *removal* of a *disorderly person* who disturbs the business of the meeting: Parsons *v.* Brainard, 17 Wend. 522, 1837. Approval by the *mayor* of *proceedings* of the council may, by special requirement of charter, be essential to their validity: Graham *v.* Carondolet, 33 Mo. 262, 1862; Kepner *v.* Commonwealth, 40 Pa. St. 124. When not: State *v.* Jersey City, 1 Vroom, 93, 148; see Dey *v.* Jersey City, 19 N. J. Eq. 412; Taylor *v.* Palmer, 31 Cal. 241; State *v.* Newark, 1 Dutch. (N. J.) 399: *post*, Sec. 265, note.

[2] Cochran *v.* McCleary, 22 Iowa, 75, 1867, and authorities there cited; Reynolds *v.* Baldwin, 1 La. An. 162, 1846; Rex *v.* Williams, 1 Burr. 402; Willc. 456, pl. 337; Rex *v.* Hertford, 1 Ld. Raym. 426; approved, Commonwealth, *v.* Arrison, 15 Serg. & Rawle, 130. *Ante*, Chap. IX. p. 186. In Cochran *v.* McCleary, *supra*, it was held that the mayor, in cities of the second class, organized under the General Incorporation Act (Rev. of Iowa, 1860, Chap. LI.), is not, *ex-officio*, a member of, nor has he any right to preside over, the city council; that the council was composed exclusively of trustees or aldermen, and elected its own presiding officer. The mayor of New York is not a member of the common council, and the common council, having the power by statute to appoint to office, may exercise it without the concurrence of the mayor, who has no veto power upon the appointments: Achley's Case, 4 Abb. Pr. Rep. 35, 1856.

[3] Cochran *v.* McCleary, 22 Iowa, 75, 86, 1867; Topping *v.* Gray, 7 Hill (N. H.), 259; affirming, S. C. 9 Paige, 507; Markle *v.* Wright, 13 Ind. 548; Hullman *v.* Honcomp, 5 Ohio, 237; People *v.* Cook, 4 Seld. 67; affirming, S. C. 14 Barb. 257; Mayor *v.* Conner, 5 Ind. 171; Mosley *v.* Alston, 1 Phill. 790; Lord *v.* The Governor, &c. 2 Phill. 740; Peabody *v.* Flint, 6 Allen (Mass.), 52; Hagner *v.* Heyberger, 7 Watts & Serg. 104; People *v.* Carpenter, 24 N. Y. 86; People *v.* Draper, 15 N. Y. 532; People *v.* Insurance Company, 2 Johns. Ch. 371; People *v.* Same Company (*quo warranto*), 15 Johns. 358; Commonwealth *v.* Bank (*quo warranto*), 28 Pa. 389; in chancery, *ib.* 379; Hughes *v.* Parker, 20 N. H. 58; *Ex parte* Strahl, 16 Iowa, 369; Updegraff *v.* Crans, 47 Pa. St. 103; Facey *v.* Fuller, 13 Mich. 527. See Kerr *v.* Trego, 47 Pa. St. 292, cited *infra*, Sec 213.

§ 211. Who shall *compose the council* or governing body of the corporation is, in all cases, prescribed by the charter or incorporation act, but the language used has been such as sometimes to lead to controversy.[1] The organic act of a city provided "that the intendant of police shall have a seat in the board of commissioners [the governing body of a city corporation], and when present, shall preside therein; *in his absence*, the board shall appoint a chairman *pro tempore*." It was held that the intendant was thereby constituted one of the commissioners, and had the right to participate in making ordinances.[2]

§ 212. It is undoubtedly true, as already stated, that *the corporate authority must be exercised by the proper body*. Thus, where a town was organized under a charter which vested the corporate powers of the place in a president and six trustees, and

[1] Cochran *v.* McCleary, 22 Iowa, 75, 1867.

[2] Raleigh *v.* Sorrell, 1 Jones (North Car.) Law, 49, 1853. In this case the Supreme Court of North Carolina admit (*arguendo*) that an officer—as, for example, the intendant—has no right, under the act of incorporation, to sit with the legislative body of the corporation, but if he does so and acts with them, that an ordinance thus passed will be void, because the powers given to the corporation must be exercised in strict conformity to the special delegation of authority, and because, in the case supposed, the ordinance is not passed by the body to which the power is given; citing Rex *v.* Croke, Cowp. 26. The view of the court is in accordance with the rule of the English courts as applied to their corporations. Thus, Mr. Willcock says: "It may be unnecessary to add, that whenever a particular business is delegated to a select body, if others join in the performance of it, the act is void; as if the mayor, aldermen, and commonalty join in making a by-law which is directed to be made by the mayor and aldermen. For if others are allowed to vote, a by-law might be established, although all those to whom the power is specifically delegated should be in the minority:" Corp. 68, pl. 128; Parry *v.* Berry, Comyns, 269; Rex *v.* Head, 4 Burr. 2521; Hoblyn *v.* Regem, 6 Bro. P. C. 520; Rex *v.* Westwood, 4 B. & C. 799, 818; Green *v.* Durham, 1 Burr. 131. Whether the mere fact that a single unauthorized person is, by a mistaken construction of the charter, allowed to participate in the transactions of a meeting of the council, would, in this country, be held necessarily to avoid them, is a question which, perhaps, remains yet to be settled. It has been held, that if persons who are not qualified vote at a town, parish, or district meeting, without objection or challenge at the time, proof of that fact cannot afterwards be made with a view to invalidate the proceedings: Sutton *v.* Cole, 3 Pick. 232, 1825. So, if such a meeting is called by persons acting under *color* of authority, it will be legal if no exception to their authority is taken at the time: *Ib.*

subsequently a general incorporation act was passed which was erroneously supposed to apply to the town, and under which the town elected different officers from those provided in the special charter, at a different time and constituting a different body, it was held, in the absence of legislative ratification, that this latter body could not exercise the authority of the corporation, since they were a body without any legal existence, and were not *the* body authorized to act for the corporation. The principle that the acts of *de facto* officers are valid was considered not to be applicable.[1]

§ 213. Where there are two bodies, each of which claims to be the regularly organized council, and is acting as such to the detriment of the public, the body rightfully entitled to act may have an *injunction* to restrain the other from interference with them. To the argument, that in relation to public corporations, the attorney general alone can file such a bill, the court replied: "We do not think so. It is right for those to whom public functions are intrusted to see that they are not usurped by others."[2]

§ 214. In this country the doctrine is everywhere declared, that the acts of *de facto officers*, as distinguished from the acts of mere usurpers, *are valid*, and the principle extends not only to municipal officers generally, but also to those composing the council, or legislative or governing body of a municipal corporation.[3] But in order that there may be a *de facto officer*,

[1] Decorah *v* Bullis, 25 Iowa, 12, 1868; Welch *v.* Ste. Genevieve, 1 Dillon, C. C. 130, 1871. *Infra*, Sec. 214.

[2] Kerr *v.* Trego, 47 Pa. St. 292, 1864, *per Lowrie*, C. J. Mode of organizing councils to which new members are to be admitted, and tests, in case of conflicting councils, for determining which is the legal organization: *Ib. Supra*, Sec. 210

[3] Scoville *v.* Cleveland, 1 Ohio St. 126, 1853; Decorah *v.* Bullis, 25 Iowa, 12, 1868; Cochran *v.* McCleary, 22 Iowa, 75, 84; *Ex parte* Strahl, 16 Iowa, 369; People *v.* Stevens, 5 Hill, 616; State *v.* Jacobs, 17 Ohio, 143; People *v.* Bartlett, 6 Wend. 422; Pritchard *v.* People, 1 Gilm. (Ill.) 529; People *v.* Runkle, 9 Johns. 147; Trustees, &c. *v.* Hill, 6 Cow. 23; Williams *v.* School District, 21 Pick. 75; see Rex *v.* Mayor, &c. 9 Mod. 111; De Grave *v.* Monmouth, 4 Car. & P. 411. In a case in the House of Lords, decided in 1851, it was held, that an act done by a definite body, under authority of parliament, was not invalid because officers *de facto* joined with officers *de jure* in

there must be a *de jure* office; and the notion that there can be a *de facto* office has been characterized as a political solecism, without foundation in reason and without support in law; and, therefore, a person cannot claim to be a *de facto* officer of a municipal corporation when the corporation or people have, in law, no power, in any event, to elect or appoint such an officer.[1]

§ 215. The common law principle, that if an act is to be done by an *indefinite body* it is valid, if passed by a majority of those present at a legal meeting, no matter how small a portion they may constitute of the whole number entitled to be present, has been deemed applicable to the towns of New England. In those towns the corporate power resides, as we have seen, in the inhabitants, or citizens at large, and these form the constituent body. If the meeting has been duly called and warned, those who assemble, *though less than a majority of the whole*, have the power to act for and bind the whole, unless it is otherwise provided by law. Those who remain away are justly and conclusively presumed to assent to what may lawfully be done by those who attend.[2]

the doing of it. The judges having unanimously declared this to be their opinion, the Lord Chancellor said: "The opinion of the judges as to vestrymen *de facto* and *de jure* was of great importance. When it was considered that there were many persons who were charged with very important duties, and whose title to perform those duties or to exercise the powers necessary for their performance, the public could not easily ascertain at the time, and when it was remembered what inconveniences would arise the validity of their acts depended on the propriety of the election of the persons who had to perform them, the value of the clear enunciation of the principle thus made by the judges was very great, and in the correctness of it he begged to declare his entire concurrence:" Scadding *v.* Lorant, 5 Eng. Law & Eq. 16, 30, *per* Lord Chancellor Thuro.

[1] Decorah *v.* Bullis, 25 Iowa, 12, 18, 1868; Hildreth's Heirs *v.* McIntire's Devisees, 1 J. J. Marsh. (Ky.) 206; People *v.* White, 24 Wend. 520, 540, 541; Carleton *v.* People, 10 Mich. 250; Welch *v.* Ste. Genevieve, 1 Dillon, C. C. 130, 1871; *supra*, Sec. 212.

[2] Damon *v.* Granby, 2 Pick. 345, 355, 1824; Commonwealth *v.* Ipswich, 2 Pick. 70; Williams *v.* Lunenburg, 21 Pick. 75; Church Case, 5 Robert. (N. Y.), 649, 1867; First Parish *v.* Stearns, 21 Pick. 148, 1838; State *v.* Binder, 38 Mo. 450, 1866.

At a popular election, a candidate for a municipal office received a *plurality* of all the votes cast, but not a majority. There was no provision of the

§ 216. The common law rules as to *quorums* and *majorities*, established with reference to corporate bodies, consisting of a *definite number* of corporators, have also, in general, been applied to the common council, or select governing body of our municipal corporations, where the matter is not specially regulated by the charter or statute. Thus, to use Mr. Dane's illustration, if the body consists of twelve common councilmen, seven is the least number that can constitute a valid meeting, though four of the seven may act.[1] Accordingly, a statute in reference to a definite body, declaring that a "*majority of those present at any regular meeting* shall be competent" to transact business, leaves the number which may form a *quorum* to be determined by the common law—that is, there must be at least a majority present, and such a provision, it was considered, did not authorize a *minority of the whole body* to act.[2]

§ 217. So, if a board of village trustees consists of *five members, and all, or four, are present, two* can do no valid act, even though the others are disqualified, by interest, from voting, and therefore omit or decline to vote; their assenting to the measure voted for by the two will not make it valid. If three only were present they would constitute a quorum, then the

charter nor any by-law on the subject. The usage in the corporation seemed to have been to consider the person having the highest number of votes, although not a majority of the whole, as duly elected. The statute in relation to *state* elections expressly provided that "plurality, or the highest number of votes, should make a choice." Under these circumstances, the majority of the court were of opinion that the common law rule, that a *majority* is necessary to a valid election applied, and was not controlled by the terms or spirit of the general election law of the state: State *v.* Wilmington, 3 Harring. (Del.) 294, 1840. *Harrington*, J., dissented, holding (and, as it would seem, with reason) that the plurality principle had been the one "invariably adopted as most in consonance with our institutions in all cases where the law of election is silent in this respect:" *Ib.* p. 305. See First Parish *v.* Stearns, 21 Pick. 148. As to *municipal elections: Ante*, Chap. IX.

[1] 5 Dane Abr. 150; *Ex parte* Willcocks, 7 Cow 402, 410, 1827, note *d*, and criticism on the rule stated in 1 Kyd on Corp. 418, 425; 2 Kent Com. 293 Buell *v.* Buckingham, 16 Iowa, 284, 1864; Regents, &c. *v.* Williams, 9 Gill & Johns. (Md.) 365; Mills *v.* Gleason, 11 Wis. 470.

[2] *Ex parte* Willcocks, 7 Cow. 402, 1827; *Ib.* 463, and note; *Ib.* 526, and note.

votes of two, being a majority of the quorum, would be valid;[1] certainly so where the three are all competent to act.[2]

§ 218. In another case, the power of amotion was conferred upon a city council to be exercised "*by a vote of two-thirds of that body*," and this was considered to give the power of removal to two-thirds of a legal quorum. Two-thirds of the whole number of members composing the council were held not to be required. The point was admitted to be close, and the French text of the charter was relied on as favoring the conclusion reached.[3]

§ 219. In a case which arose in California, the charter of the city contained a provision that no ordinance should be passed by the common council, except by a *majority of all the members elected.* Eight were elected, and it was decided, under the abovementioned requirement of the charter, that an ordinance could not be passed by a vote of *four* against three, since four did not constitute a majority of all the members elected, although it did constitute a majority of a legal quorum.[4]

§ 220. In the absence of special provision, the *major part of those present*, at a meeting of a select body, *must concur* in order to do any valid act. Therefore, when it appeared that thirteen ballots were cast when the members present were only entitled to give twelve votes, of which seven were for one person and six for another, there is no election, and the council, though it has declared that the person receiving seven votes was duly elected, may subsequently rescind its action and proceed to a new election.[5] And in South Carolina the general rule is recognized, and a *majority* of the board of managers of

[1] Coles *v.* Williamsburg, 10 Wend. 658, 1833.

[2] Buell *v.* Buckingham, 16 Iowa, 284, 1864, and cases cited.

[3] Warnock *v.* Lafayette, 4 La. An. 419, 1849. See, on this point, Logansport *v.* Legg, 20 Ind. 315.

[4] San Francisco *v.* Hazen, 5 Cal. 169, 1855. See, also, Oakland *v.* Carpentier, 13 Cal. 540; McCracken *v.* San Francisco, 16 Cal. 591; Piemental *v.* San Francisco, 21 Cal. 351.

[5] Labourdette *v.* Municipality, 2 La. An. 527, 1847.

elections — having power, by statute, to determine the validity of contested elections — is a quorum, and a majority of that quorum may act and decide.[1]

§ 221. And, as a *general rule*, it may be stated, that not only where the corporate power resides in a *select body*, as a city council, but where it has been delegated to a *committee* or to *agents*, then, in the absence of special provisions otherwise, a *minority* of the select body, or of the committee or agents, are powerless to bind the majority or do any valid act. If all the members of the select body or committee, or if all of the agents are assembled, or if *all* have been duly notified, and the minority refuse or neglect to meet with the others, a majority of those present may act, provided those present constitute a majority of the whole number. In other words, in such case, a major part of the whole is necessary to constitute a quorum, and a majority of the quorum may act. If the major part withdraw so as to leave no quorum, the power of the minority to act is, in general, considered to cease.[2] But where the duties are purely ministerial, and not judicial, or are of such a nature as to exclude the idea of action as a body or board, and where they are devolved on *public* officers or agents rather than on the agents of corporations, the rule above stated (as the cases below referred to will show) has been relaxed, and, in some instances, deemed wholly inapplicable.[3]

[1] State *v.* Deliesseline, 1 McCord (South Car.), 52, 1821, where the subject is elaborately considered by *Noti*, J.; S. P. State *v.* Huggins, Harper (South Car.), Law, 94, 1824, further holding that where, of eighteen managers appointed by the legislature, two refused to qualify, one was disqualified, and one dead, the remaining fourteen (from necessity and public convenience) properly constituted the board, and might act by a majority of the fourteen. The decision rests upon the legislative intent, deduced from various provisions of the act, to commit the matter to the *acting* managers.

[2] Kingsbury *v.* School District, 12 Met. 99, 1846; Day *v.* Green, 4 Cush. 438, 439, 1849; Fisher *v.* School District, 4 Cush. 494, 1849; Coffin *v.* Nantucket, 5 Cush. 269, 1850; 11 Cush. 433; Damon *v.* Granby, 2 Pick. 345, 355, 1824; State *v.* Jersey City, 3 Dutch. (N. J.) 493; Charles *v.* Hoboken, *ib.* 203; Dey *v.* Jersey City, 19 N. J. Eq. 412, 1869; Baltimore *v.* Poultney, 25 Md. 18, 1866.

[3] With respect to persons or officers appointed by law to act *judicially* in a *public* matter, it is generally held, there being no provision of statute to the contrary, that where *all meet* and act, *a majority* may decide and bind

§ 222. The doctrine of the English courts is, that all of the *integral parts* of a corporation necessary to do an act must not only meet, but remain present till the act is completed; and

the rest, and this notwithstanding the express dissent of the minority, or their wrongful withdrawal before the act is consummated: *Ex parte* Rogers, 7 Cow. 526, 1827 (appraisal of damages by canal appraisers), and see *ib.* note *a*, and the cases there cited and reviewed; *Ib.* 764, explanation. See, further, *Ex parte* Willcocks, 7 Cow. 402, and note; *Ib.* 462, 463; Young *v.* Buckingham, 5 Ohio, 485, 489, 1832; Charles *v.* Hoboken, 3 Dutch. (N. J.) 203; Martin *v.* Lemon, 26 Conn. 192, 1857.

The statute authorized the appointment of three levee inspectors, and prescribed their duties, which involved the exercise of judgment. Held, that all must meet and act, and that the action of a majority in the absence of the third was void: Ballard *v.* Davis, 31 Miss. 525, 1856.

Where a *majority of a committee* is authorized to act, they constitute a party capable of contracting, and another member of a committee, not acting as such, but as an individual, constitutes another party capable of being contracted with. It is accordingly held, that a *majority* of such a committee may contract with or employ *one of their own number*, and such contract, if fairly made and without fraud or corruption, will be binding upon the corporation: Junkins *v.* Union School District, 39 Maine, 220; Buell *v.* Buckingham, 16 Iowa, 284; Willard *v.* Newburyport, 12 Pick. 227. But a contract made by less than a majority of a committee of the corporation, though in the name of the whole, binds *neither* party. But it will be binding if the authority was joint and several, or if ratified: Adams *v.* Hill, 16 Maine (4 Shep.), 215, 1839; Kupfer *v.* South Parish, &c. 12 Mass. 185, 1815; Allen *v.* Cooper, 22 Maine, 133, 1842. In Damon *v.* Granby, 2 Pick. 345, 1842, this distinction is taken: If a public corporation appoints a committee of its *own members*, a majority may bind, for such is the usage and the common law in relation to corporations. But if the authority is given to persons not members of the body, such persons are agents, and not technically a committee, and all must concur, unless it appear that it was intended that a majority should act: See authorities cited by Solicitor General Davis in same case, p. 350; Viner's Ab. Title, *Authority* B. pl. 7. Further as to binding force of the act of majority of a committee or board of selectmen, see Jones *v.* Andover, 9 Pick. 146; Crommett *v.* Pearson, 18 Maine (6 Shep.), 344, 1841; Junkins *v.* School District, 39 Maine, 220, 1855; Inhabitants, &c. *v.* Cole, 3 Pick. 232, 244; Kingsbury *v.* School District, 12 Met. 99, 1846; Keyes *v.* Westford, 17 Pick. 273, 1835; Green *v.* Miller, 6 Johns. 39, 1810; Grindley *v.* Barker, 1 Bos. & Pul. 236, *per Eyre*, C. J.; King *v.* Boston, 3 Term R. 592; Guthrie *v.* Armstrong, 5 Barn. & Ald. 628, 1822, where it was held, that a power given to fifteen jointly and severally was well executed by four. A school committee appointed according to and under a statute are public officers within the meaning of the statute which gives a majority of such officers authority to act for the whole: Keyser *v.* School District, 35 N. H. 477, 1857. Where an authority is given, by law, to a committee, or to more persons than one, to do an act of a public nature,

therefore if one of such parts deserts or withdraws, though wrongfully, and to defeat any action, before the act is con-

one alone, unless there be something to show such intention, cannot act independently and without the concurrence of the others, or at least of a majority. If the act is *ministerial*, a majority at least must concur; but unless required, or such is the practice, they need not act as a board, and be convened or notified to be convened as such. But if the act is *judicial* in its nature, that is, requiring the exercise of judgment, unless special provision is otherwise made, all must meet or have notice to meet, a majority will constitute a quorum, and a majority of the quorum will be competent to act: Martin *v.* Lemon, 26 Conn. 192, 1857. In this case it was ruled, that one of a committee of three to remove encroachments on highways could act alone Committees of public corporations have sometimes been held to be governed, with respect to meeting and notice, by different rules from a board which has necessarily to be assembled or convened before it can act. And the acts of a majority of such committees have been considered valid, though some member of the committee was not notified: Gallup *v.* Tracy (town committee to stake out oyster grounds), 25 Conn. 10, 1856. But compare, Martin *v.* Lemon, 26 Conn. 192. And see Damon *v.* Granby, 2 Pick. (Mass.) 345, 354; Grindley *v.* Barker, 1 Bos. & Pul. 229; Keeler *v.* Frost, 22 Barb. 400; Perry *v.* Tyner, *ib.* 137. Where a public authority is to be exercised by two officers — a number not admitting of a majority — regularly, both should act; yet, to prevent a failure of justice, it seems one may, in certain cases, as where the other is dead, disqualified, or absent, act alone. But certain it is, that where one only acts, the *consent of the other will be presumed.* This is an application of the strong presumption which obtains in favor of the performance of official duty: Downing *v.* Rugar, 21 Wend. 178, 1839, and authorities cited. This case also holds, that the presumption of consent could be rebutted only by the testimony of the *other* officer: *Ib.* 185. "It is a general principle, that where a board of officers (for example, overseers of the poor) is constituted to perform a duty provided by law, the act of the majority is the act of the whole body:" *Per Bennett*, J., Wolcott *v.* Wolcott, 19 Vt. 37, 39, 1846. See, also, King *v.* Beesten, 3 Term R. 592; Jones *v.* Andover, 9 Pick. 146.

Under the statutes of Pennsylvania, all powers conferred upon county commissioners may be legally executed by two without the concurrence of the third: Commissioners *v.* Leckey, 6 Serg. & Rawle, 166; Cooper *v.* Reansbey, 8 Watts, 128; Curtis *v.* Butler Co. 24 How. (U. S.) 435.

Where three commissioners are appointed to contract for site for poor house, two of them cannot make a valid purchase: Pulaski Co. *v.* Lincoln, 4 Eng. (Ark.) 320, 1849. Action of less than a majority of commissioners of public buildings, appointed by act of legislature, is void: Petrie *v.* Doe, 30 Miss. 698, 1856. A statute declaring that every board of township trustees, "and the *members* thereof," shall be overseers of the poor, was construed to make *each* member an overseer, with power to act: County Commissioners *v.* Jones, 7 Ind. 3, 5, 1855. When majority may lawfully execute powers of a public nature: Commissioners *v.* Lecky, 6 Serg. & Rawle (Pa.),

summated, the act is not valid.[1] The liability of this rule to abuse, since it enables one of the parts of a joint meeting or assembly to defeat any action whatever, has led the courts in this country to deny its applicability here, or to apply it with caution.[2]

170; Baltimore *v.* Turnpike, 5 Binn. 484; McCready *v.* Guardians, 9 Serg. & Rawle, 99; Commonwealth *v.* Commissioners, 9 Watts, 466, 471; Cooper *v.* Lampeter, 8 Watts, 128; Caldwell *v.* Harrison, 11 Ala. 755; Commissioners *v.* Tarver, 21 *ib.* 661; Crist *v.* Town Trustees, 10 Ind. 452; Schenck *v.* Peay, 1 Dillon, C. C. R 267.

[1] King *v.* Williams, 2 Maule & Sel. 141; following King *v.* Butler, 8 East, 388; questioning King *v.* Norris, 1 Barnard. K. B. 385; cited and reviewed, 7 Cow. 526, note; King *v.* Miller, 6 Term R. 278; 2 Kent's Com. 292. Mr. Willcock vindicates the rule, but on grounds not very satisfactory. Corp. 53, 54. *Supra*, Sec. 209.

[2] *Ex parte* Humphreys, 10 Wend. 612, 1834; People *v.* Batchelor, 22 N. Y. 128, 146, *per Denio*, J.; First Parish *v.* Stearns, 21 Pick. 148, 1838; Coles Co. *v.* Allison, 23 Ill. 437.

The common law rule, that to the *due constitution of a corporate assembly* a majority, at least, of each integral or component part or body, must necessarily be present, was departed from by the Supreme Court of New Hampshire in the case of Beck *v.* Hanscom. By the charter, the city government of Portsmouth was vested in a mayor, "one council of seven, to be denominated the board of aldermen, and one council of twenty-one, to be denominated the common council, which boards shall, in their joint capacity, be denominated the city council." It was further provided by the charter, that a "majority of each board should constitute a quorum;" that the two bodies should sit and act separately, except "when the two are required to meet in convention;" that at the meeting of the "city council in convention, if it shall appear that a majority of either of said bodies is not present," the members may compel the attendance of the absentees, &c. The board of aldermen and the common council separately voted to meet in convention on the 12th of June, for the choice of city officers; but when the time arrived, only a minority (three out of seven) of the board of aldermen appeared. The common council and these aldermen, twenty-three in all, being a majority of both boards, proceeded to elect city officers; and it was held, 1st, that the election was valid; and 2d, that a majority of the twenty-three present could elect. In reference to this decision it may be observed, that the court take no notice of the power of compelling the attenance of the absentees, and that this provision seemed to contemplate the presence of a majority of *each* of the constituent bodies. The court cite and approve Whitside *v.* People, 26 Wend. 634, and *Ex parte* Humphreys, 10 Wend. 612; in both of which, however, the constituent bodies, so to call them, duly met but refused to act. It is substantially admitted by the court, that the decision they make is not in conformity with the English rule, but they consider it to be the one "which will best enable the government of the city to proceed with regularity;" and that "after

§ 223. The usual division of the *meetings of corporate bodies* is into (1) *stated* or *regular*, and (2) *special* meetings; and meetings of either class possess an incidental power of *adjournment*, from whence we have another class known as *adjourned meetings*. The time of holding regular or stated meetings is fixed by the charter, or by ordinance or by-law, passed in pursuance thereof, and, in either case, the time thus appointed is presumed to be known to the members of the body; and unless the charter or by-law otherwise provides, it is their duty to attend such meetings without further or special notice. Absent members, equally with those who are present, are bound by whatever is lawfully done at a regular or stated meeting, or any regular and valid adjourned meeting.[1]

§ 224. If the meeting be a *special* one, the general rule is, unless modified by the charter or statute, that *notice* is necessary, and must be personally served, if practicable, upon *every member* entitled to be present, so that each one may be afforded an opportunity to participate and vote.[2] By the char-

every preliminary step has been properly taken, the mere neglect of one of the constituent bodies to carry its previous vote into effect ought not to hinder the other bodies from performing the duties required by the charter." *Per Gilchrist*, C. J., in Beck *v.* Hanscom, *supra*, 9 Fost. 213, 226. In Kimball *v.* Marshall, 44 N. H. 465, 1863, Bell *v.* Hanscom, *supra*, is approved, and its doctrine applied to a different state of facts.

Effect of refusal of *one* of *two distinct bodies* to go into a *joint* meeting, or, after being assembled in joint meeting, to participate in "the *joint* ballot" by which officers (by statute) are to be removed or appointed, see, in Court of Errors, Whitside *v.* The People, 26 Wend. 634, 1841: reversing decision of Supreme Court in same case, 23 Wend. 9. See act of congress of July 25, 1866 (14 Statutes at Large, 243), regulating the election of United States senators by the legislatures of the several states in *joint assembly*, containing provisions (the necessity for which has been shown by experience) to prevent one of the bodies from defeating action.

[1] People *v.* Batchelor, 22 N. Y. 128, 1860; Smith *v.* Law, 21 N. Y. 296; Hudson Co. *v.* State (presumption of regularity), 4 Zabr. 718; Insurance Co. *v.* Sanders, 36 N. H. 252. See and compare, State *v.* Jersey City, 1 Dutch. (N. J.) 309.

[2] People *v.* Batchelor, 22 N. Y. 128, 134, *per Selden*, J.; *ib.* 146, *per Denio*, J.; *Ex parte* Rogers, 7 Cow. 526, and cases cited in valuable note; Downing *v.* Rugar, 21 Wend. 178; Burgess *v.* Pue, 2 Gill (Md.), 254; Stow *v.* Wise, 7 Conn. 214; Smith *v.* Darley, 2 House Lords' Cases, 789, 1849.

At a stated meeting of a select body at which all the members are not present, it is not competent, in the opinion of the Court of Appeals of New

ter of a city, the power of imposing taxes belonged to the inhabitants assembled in annual town meeting. It was provided, that if, at this meeting, no tax was voted, or an insufficient tax, the common council "should call a meeting of the inhabitants, by advertisement or otherwise," for the purpose of having them vote a tax. The court seemed to be of opinion, that the common council were obliged to specify the objects of the call in their notice, it being a special meeting; and it decided, that if it did specify a particular purpose, that any act of the meeting, "wholly beside the special purpose of the meeting as stated," was void.[1]

§ 225. A *regular meeting*, unless special provision is made to the contrary, *may adjourn* to a future fixed day; and at such meeting it will be lawful to transact any business which might have been transacted at the stated meeting, of which it is, indeed, but the continuation. Unless such be the special requirement of the charter or a by-law, the adjourned regular meeting would not, it is supposed, be limited to completing particular items of business which had been actually entered upon and left unfinished at the first meeting; but might, if the adjournment was general, do any act which might have been done had no adjournment taken place.[2] Where the meeting, if a regular one, can only act upon a specific matter, or, if a special one, can only act upon matters of which notice has been given to the members, while it is competent, in

York, in the absence of a statute or by-law to that effect, to appoint a future new or special meeting to determine independent matters not taken up, and which could not legally have been taken up, at the stated meeting, and to act at such future time, unless *all* have *actual* notice. If any one thus entitled to notice does not receive it, and is not present, the action is void. People *v.* Batchelor, 22 N. Y. 128, 1860; to be read in connection with Smith *v.* Law, 21 N. Y. 296.

[1] Bergen *v.* Clarkson, 1 Halst. (N. J.) 352, 1796. See, also, Rex *v.* Liverpool, 2 Burr. 735; Rex *v.* Doncaster, *ib.* 735; King *v.* Mayor, &c. 1 Str. 385; Machell *v.* Nevinson, 2 Ld. Raym. 1355; 2 Bac. Abr. 18.

[2] Smith *v.* Law, 21 N. Y. 296; Warner *v.* Mower, 11 Vt. 385; People *v.* Batchelor, 22 N. Y. 128; Rawlinson on Corp. (5th ed.) 136, note; Scadding *v.* Lorant, 5 Eng. Law and Equity, 16, 1851; People *v.* Martin, 1 Seld. (N. Y.) 22; Street Case, 1 La. An. 412; Hudson Co. *v.* State, 4 Zabr. 718.

either case, to adjourn, the adjourned meeting is, in both cases, limited, equally with the first meeting, to the specified matters.[1]

Mode of Proceeding when Convened.

§ 226. After a meeting of the council is duly convened, the *mode of proceeding* is regulated by the charter or constituent act, by ordinances passed for that purpose, and by the general rules, so far as in their nature applicable, which govern other deliberative and legislative bodies. If the council consists of two boards, the concurrence of both is essential to valid legislation, and this concurrence must be by simultaneously existing bodies.[2] The rule of legislative bodies consisting of two branches, that unfinished business at the end of a session is discontinued, and must be afterwards taken up anew, if at all, was considered applicable to the legislative

[1] Scadding *v.* Lorant, 5 Eng. Law and Equity, 16; S. C. 17 Law T. 225, H. of L. 1851. In this case, the statute (a local act) required notice to be given of a meeting of vestrymen to be held for the *purpose* of making a rate for the relief of the poor. Such notice was given, specifying the purpose of the meeting; the meeting was held accordingly, on the 12th of August, when it was resolved that a rate should be made; but as the details could not be completed, the meeting was adjourned, and at an adjourned meeting the matter of the rate was completed; but the notice for the adjourned meeting contained no mention of the purpose for which the meeting assembled. And the question which the House of Lords put to the judges, in reference to the adjourned meeting, was: "Supposing the rate to be otherwise valid, was it invalid by reason of the notice not stating the purpose for which the [adjourned] meeting assembled?" The judges answered: "We are unanimously of opinion, that the rate was not rendered invalid by reason of the alleged defect in the notice of the adjourned meeting. It was sufficient to give notice [as required by the act] on the church door of the purpose for which the first meeting was to be held, and, that notice having been duly given, we think that the notice so given extended to all the adjourned meetings, such adjourned meetings being held for the purpose of completing the unfinished business of the first meeting, and being in continuation of that meeting." And such was the judgment of the House of Lords. See, also, King *v.* Harris, 1 Barn. & Ad. 936.

Presumption as to regularity of adjournment when proceedings of the adjourned meeting come before the court: Hudson Co. *v.* State, 4 Zabr. (N. J.) 718; Insurance Co. *v.* Sortwell, 8 Allen, 217; State *v.* Jersey City, 1 Dutch. (N. J.) 309.

[2] Wetmore *v.* Story, 22 Barb. 414, 1856.

acts of the common council of New York, composed of a board of aldermen and a board of assistant aldermen.[1]

§ 227. The council may ascertain facts through the medium of a *committee*, and the members of the council may, where they know the facts of their personal knowledge, act without further inquiry.[2] As a public corporation may entirely revoke the powers of a committee it has appointed, so it may control the execution of those powers by increasing the number of the committee. If the new members, either by design or mistake, are excluded from acting, the proceedings of the others will be irregular.[3]

§ 228. At any time before the *rights of third persons* have attached, a council or other corporate body may, if consistent with its charter and rules of action, *rescind* previous votes and orders.[4] Thus, a vote levying a tax, so long as it rests in

[1] Wetmore *v.* Story, 22 Barb. 414, 1856. A subsequent council is bound by knowledge duly communicated to a previous council. Bank *v.* Seton, 1 Pet. (U. S.) 299, 1828. In Commonwealth *v.* Lancaster, 5 Watts, 152, *Gibson*, C. J., expressed his opinion to be, that notwithstanding a by-law or rule requires certain corporate acts to be in a given form, and that alterations of such by-law or rule shall only be made by a vote of two-thirds of the members, yet that a majority may repeal the by-law or rule, and may, without such repeal, do valid acts, not in the prescribed form, by a majority vote.

[2] Bissell *v.* Jeffersonville, 24 How. (U. S.) 287, 296, *per Clifford*, J.; Commonwealth *v.* Pittsburg, 14 Pa. St. 177, 1850. As to power of council to appoint officers, and when it may delegate its powers to a committee: *Ib.;* Preble *v.* Portland, 45 Maine, 241; *ante*, p. 109.

[3] Damon *v.* Granby, 2 Pick. 345, 1824. In this case it was further held, where the agents of a town contracted with the plaintiff "to erect a meeting-house on a place to be designated by a committee of the town," that the town might disagree to the selection, and "designate the place for themselves, at any time before the ground was prepared," on indemnifying the plaintiff for any extra labor or expense which their fluctuating proceedings may have occasioned. A notice to appear before a committee to whom a matter, as for example, the laying out or altering of a street, has been duly referred, is equivalent to a notice to appear before the city council, as, for this purpose, the committee represent the council. Preble . Portland, 45 Maine, 241, 1858.

[4] Bigelow *v.* Hillman, 37 Maine, 58; Reiff *v.* Conner, 5 Eng. (Ark.) 241; State *v.* Hoyt, 2 Oregon, 246; *ante*, pp. 86, 88; Road Case, 17 Pa. St. 71, 75; New Orleans *v.* St. Louis Church, 11 La. An. 244. "The right of *reconsider-*

mere resolution, and has not been acted upon, may be reconsidered, and if rescinded, the collector cannot legally proceed to collect the tax.[1]

§ 229. A provision of a city charter, that the *ayes and nays shall be called* and published whenever the vote of the common council should be taken on any proposed improvement involving a tax or assessment upon the citizens, was considered, by two of the three members of the Supreme Court of New York, notwithstanding the use of the word "*shall*," to be directory merely; "the essential requisite being the determination of the corporation, and not the form or manner of expressing that determination."[2]

§ 230. Acts done *when less than a legal quorum* is present, or which were not concurred in by the requisite number, are void.[3] This is a fundamental rule in the law of corporations;

ing lost measures [at the same meeting, or pursuant to its rules] inheres in every body possessing legislative powers." *Per Whelpley*, C. J., Jersey City *v.* State, 1 Vroom (N. J.), 521, 529, 1863; Red *v.* Augusta, 25 Ga. 386. "All deliberative assemblies, during their session, have a right to do and undo, consider and reconsider, as often as they think proper, and it is the *result* only which is done." *Per Kirkpatrick*, C. J., in State *v.* Foster, 2 Halst. (N. J.) 101, 107, 1823. See, also, State *v.* Jersey City, 3 Dutch. 536. While public money is in the possession of the proper officer, the proper authorities have entire control over it, and they may, so far as the officer holding it is concerned, rescind a prior order (not yet complied with) to pay money to an individual. Tucker *v.* Justices, 13 Ire. (N. Car.) Law, 434; Dey *v.* Lee, 4 Jones (N. Car.), Law, 238.

[1] Stoddard *v.* Gilman, 22 Vt. 568; Pond *v.* Negus, 3 Mass. 230.

[2] Striker *v.* Kelly, 7 Hill (N. Y.), 9, 24, 29, 1844, *Bronson*, J., dissenting; S. C. in Error, 2 Denio, 323; Indianola *v.* Jones, 29 Iowa, 282; *In re*, Mount Morris Square, 2 Hill, 20; Elmendorf *v.* Mayor, &c. of N. Y. 25 Wend. 693. In Morrison *v.* Lawrence, 98 Mass. 216, the grant of an important special power was construed to require, as a condition to its exercise, the taking of the ayes and nays, and a record of the vote. The decision or determination of a question by a town meeting or common council should be, and probably must be, by a formal *vote* or *resolution*. People *v.* Adams, 9 Wend. 333, 1832; Denning *v.* Roome, 6 Wend. 651, 1831.

[3] Logansport *v.* Legg, 20 Ind. 315, 1863; Ferguson *v.* Chittenden Co. 1 Eng. (Ark.) 479, 1846; Price *v.* Railroad Company, 13 Ind. 58, 1859; McCracken *v.* San Francisco, 16 Cal. 591; Piemental *v.* San Francisco, 21 Cal. 351. Number present and acting, how proved: 13 Ind. 58, *supra*. Presence of quorum when presumed: Insurance Company *v.* Sortwell, 8 Allen, 217.

but whether in favor of the holder of negotiable securities issued, or purporting to be issued, under authority conferred by the legislature, the corporation might not, in some cases, be estopped to show that a quorum was not present or that the requisite number did not concur in the act, is a question which remains, perhaps, to be settled.[1]

[1] See *ante*, p. 101, Sec. 55; *post*, chapter on Contracts.

CHAPTER XI.

Corporate Records and Documents.

§ 231. Corporations have the incidental power, if the regular clerk is temporarily absent, to appoint a private person a *clerk pro tem* for the purpose of making the entries of what is transacted at the corporate meeting. His entries, made by the direction of the corporate authorities, or entries made by the regular clerk from memoranda furnished by the clerk *pro tem*, are competent evidence of the proceedings of the meeting.[1]

§ 232. The clerk or officer of a New England town[2] *who has made an erroneous record*, may, while in office (but not afterwards), or after a re-election to the same office, *amend* the same according to the truth, being liable, like a sheriff who amends his return, for any abuse of the right, as where he makes a fraudulent or untruthful amendment. The town is not concluded or bound by an erroneous record, whether made by design or accident, unless when it would, on general principles, be estopped.[3]

[1] Hutchinson *v.* Pratt, 11 Vt. 402, 1839. See, also, Rex *v.* Mothersell, 1 Stra. 93, also referred to *infra*. Failure of clerk to take *oath of office* does not invalidate his record: Stebbins *v.* Merritt, 10 Cush. 27. *Ante*, Sec. 153. *Signature of chairman* to minutes affixed at a day subsequent to the meeting, held sufficient, under a statute requiring the minutes of corporate meetings to be signed by the chairman: Miles *v.* Bough, 3 Gale & D. 119; Inglis *v.* Railway Company, 16 Eng. Law and Eq. 55. See, also, chapters relating to Corporate Meetings and Corporate Officers.

[2] *Ante*, p. 34.

[3] Cass *v.* Bellows, 11 Fost. (N. H.) 501, 1855; Harris *v.* School District, 8 Fost. 58, 66, 1853; Gibson *v.* Bailey, 9 N. H. 168; Whittier *v.* Varney, 10 N. H. 291; Wells *v.* Battelle, 11 Mass. 477; Low *v.* Pettingill, 12 N. H. 340; Pierce *v.* Richardson, 37 N. H. 306; Scammon *v.* Scammon, 8 Fost. 429; President, &c. *v.* O'Malley, 18 Ill. 407, 1857; Mott *v.* Reynolds, 27 Vt. (1 Wms.) 206, 1855; Boston Turnpike Co. *v.* Pomfret, 20 Conn. 590, 1850; compare Covington *v.* Ludlow, 1 Met. (Ky.) 295, below cited. The necessity and reasonableness of the doctrine, stated in the text, are thus expounded

§ 233. In a case in Vermont, the clerk of the town, *pending a trial, amended the record* by adding his signature as clerk to the record of the warning for the meeting in ques-

by *Parker*, C. J., in Wells *v.* Battelle, 11 Mass. 477, 481, 1814: "We have had frequent occasion to perceive the great irregularity which prevails in the records of our towns and other municipal corporations; and the courts have always been desirous to uphold these proceedings, where no fraud or wilful error was discoverable. Too much strictness on subjects of this nature would throw the whole body politic into confusion [Kellar *v.* Savage, 17 Maine, 444]. For it cannot be expected that, in all corporations, persons will be every year selected, who are capable of performing their duty with the exactness which would be useful or convenient." "The first entry made by the clerk here [that an officer was *sworn* into office] was certainly defective, but the defect is properly cured by the subsequent entry of the existing clerk, he being the same person that officiated at the time of the first entry. He will be sufficiently watched by interested parties, to render a deviation from truth neither safe nor easy." The doctrine of the case in 11 Mass. 477, was followed and applied in Chamberlain *v.* Dover, 13 Maine, 466, 1836, where it was further held, that the municipal body was not bound by an erroneous record of a clerk, even though the plaintiffs, confiding in its correctness, had made a building contract with the "contracting and building committee" named in the record. The meeting, in this case, which attempted to confer this power upon the committee, was not a legal one, because not held at the time and place appointed; and it was considered by the court that the plaintiffs' remedy was against the committee and not against the town, if the former acted without authority. See, further, as to correcting and amending records, Williams *v.* School District, 21 Pick. 75, holding that where two different, but not contradictory, records were made up by the clerk from memoranda taken at the meeting that both were originals and competent testimony. Clerk cannot amend records *after he is out of office:* School District *v.* Atherton, 12 Met. 105, 1846; Hartwell *v.* Littleton, 13 Pick. 229, 232, 1832; *Contra*, to the effect that he may amend, though out of office at the time, see Gibson *v.* Bailey, 9 N. H. 168, 1838. But may, while he is *in office:* Bishop *v.* Cone, 3 N. H. 513, 1821; Hoag *v.* Durfey, 1 Aiken (Vt.), 286, 1826; Chamberlain *v.* Dover, 13 Maine, 466, 1836. That *successor* cannot make the amendment: State *v.* Williams, 25 Maine, 561, 565; 29 *ib.* 523; Taylor *v.* Henry, 2 Pick. 397. But the corporation might, in proper cases, authorize the successor to supply the omitted, or correct the erroneous, entry: Hutchinson *v.* Pratt, 11 Vt. 402, 419.

In *New Hampshire* it is the practice to allow these amendments only upon the order of the Supreme Court or Court of Common Pleas by the officer by whom they were made, even after he has ceased to hold the office. A clear case must be made out. The court do not permit any erasures or interlineations of the original record, but require the amendment to be written upon a separate piece of paper, signed by the proper officers, and with it a copy of the order allowing the amendment; and this paper is annexed to the original record: Pierce *v.* Richardson, 37 N. H. 306, 311, *per Bell*, J.

tion. His right to do so, though he had meantime been out of office, but was again restored, was sanctioned by the Supreme Court, *Redfield*, C. J., remarking: "We think, in general, it must be regarded as the right of the clerk of a town or other municipal corporation, while having the custody of the records, to make any record according to the facts. His having been out of office, and restored again, could not deprive him of that right. But even an officer could not alter or amend a record upon the testimony of third persons ordinarily, and ought not to do it upon his own recollection unless in very obvious cases of omission or error, of which the present might fairly be regarded as one, probably. Such amendments should ordinarily be made by the original documents or minutes."[1] The right of *the clerk ex parte* to *amend the records* of the proceedings of town corporations was very thoroughly considered in a case in Connecticut.[2] The statute of that state requires town clerks to keep the record books of their respective towns, and to enter truly all the votes and proceedings of the town. The town clerk made an entry showing that at a town meeting held in 1843, the town assumed to the plaintiff a liability to commence January 1, 1844. If the time thus stated was the true time, the plaintiff had a cause of action against the town. In 1849, the clerk, not upon his own personal knowledge, nor upon any written memorandum, but on the information of others (with the correctness of which, however, he was perfectly satisfied), amended the record so as to show that the liability of the town was not, by the vote, to commence until April 1, 1844. If this was the true time, the plaintiff had no cause of action. The majority of the court (three judges against two) held that the clerk, still continuing in office, was competent to amend the record — that this power is derived solely from his official character, and does not depend on the permission of the court, in which the record is offered as an instrument of evidence, nor on inquiry into the truth of it as origin-

[1] Mott *v.* Reynolds, 27 Vt. (1 Wms.) 206, 208, 1855. Amendment in open court of town record by clerk of the town pending trial, to which the clerk is a party, and to meet a particular decision of the court, disregarded: Hadley *v.* Chamberlain, 11 Vt. 618, 1839. Commented on and distinguished: Mott *v.* Reynolds, 27 Vt. (1 Wms.) 206, 1855.

[2] Boston Turnpike Co. *v.* Pomfret, 20 Conn. 590, 1850.

ally made, or as amended, and that such a record is, in such an action, conclusive evidence of its own truth. The dissenting judges, without denying the power of amendment in all cases, were of opinion that in view of the lapse of time, the absence of written memoranda, or personal recollection by the clerk, the clerk had no authority to make the amendment, and that the correct course would have been to have made application to the proper court by legal process, *e. g. mandamus*, to correct the mistake in the record, if one existed, and thus give the opposite interested party an opportunity to show that the record was already right. It would seem, under the special circumstances that the dissenting view was the better one.

§ 234. Where the clerk makes up the record of the proceedings of the council, and it is *read and approved* at the same or at a subsequent meeting, the author doubts his authority, on his own motion, to amend it afterwards without the direction of the council. The council, unless private rights have attached, may, doubtless, order the record of its own proceedings, even after it has once been approved, to be corrected according to the facts. The Court of Appeals of Kentucky, without determining the extent of the power of the same council at a subsequent meeting, to correct errors and omissions in the journal entry of proceedings at a previous meeting, decided that this could not be done *by an entirely new board* in respect to the official action of their *predecessors;* and it was accordingly held, that where the records, as kept, showed only that in August, 1854, an ordinance was reported, a new council could not, in 1856, add to the records words showing that the ordinance *had passed*, nor could the fact of its passage be shown by extrinsic evidence.[1]

§ 235. *Parol evidence* may, if necesssary, be admitted to apply a resolution or recorded vote of a town to its proper subject matter,[2] but not, in general, to explain, enlarge, or contradict

[1] Covington *v.* Ludlow, 1 Met. (Ky.) 295, 1858; see, also, Lexington *v.* Headley, 5 Bush (Ky.), 508, 1869; Graham *v.* Carondelet, 33 Mo. 262; State *v.* Jersey City, 1 Vroom (N. J.), 93, 148, and chapters on Corporate Meetings and Ordinances, *post.*

[2] Baker *v.* Windham, 13 Maine (1 Shep.), 74, 1836. In this case the town of Windham entered upon its records the following: "Voted to indemnify

its terms or meaning, in respect to matters (as, for example, laying out a highway or street) regularly within the jurisdiction of the town or its officers, and where the entry of record is made in pursuance of law.[1] Where the record of a meeting states that "the inhabitants met and adjourned the meeting," *parol evidence* may be admitted to show when and where the meeting was had, how many were present, and how many afterwards came, and, finding no meeting, went home.[2]

§ 236. *Parol evidence* in a collateral action cannot be received *to contradict* the records of a public corporation, required by law to be kept in writing, or to show a *mistake* in the matters as therein recorded. Thus, if the records of a school district show that the district voted to authorize their clerk to call and warn "their *annual* meetings," parol evidence in an action by the district is not admissible to prove that the real vote of the district was to authorize the clerk to call and warn

Benj. Baker, in his costs in the action against *A. Small,* which have or may arise in the same on account of *Gray* line." In an action by Baker against the town to recover costs of a suit which he had brought against Small, parol evidence was adjudged to have been rightly admitted to show that Baker brought the action in his name against Small, on account of the *Gray* line, at the request of the selectmen at Windham, for the purpose of settling a disputed line between that and the adjoining town, with the express agreement that the town should pay all costs, and to show that these facts were before the town when the vote was passed, and also to show that the suit so instituted was conducted under the advice and direction of the authorities of the town.

[1] Manning *v.* Fifth Parish, &c. 6 Pick. 16; Crommett *v.* Pearson, 18 Maine, 344; Covington *v.* Ludlow, 1 Met. (Ky.) 295; Cabot *v.* Britt, 36 Vt. 349; Lexington *v.* Headley, 5 Bush (Ky.), 508, 1869.

[2] Chamberlain *v.* Dover, 13 Maine, 466, 1836. But parol evidence of an adjournment to another day cannot be given so as to validate acts done on the day adjourned to: Taylor *v.* Henry, 2 Pick. 397. Where a statute requiring a record to be made of the persons sworn into office is directory, if the record is not made, the fact may be shown by parol or other competent evidence: Kellar *v.* Savage, 17 Maine (5 Shep.), 444, 1840. In the M. E. Corporation *v.* Herrick, 25 Maine, 354, it was held, that to establish a resulting trust in the corporation [with respect to lands], it could not prove the authority of the committees to act for it by parol evidence; the authority should appear, and could only be shown by its records. Further as to what facts may be shown by parol: Bath *v.* County Commissioners, 36 Maine, 74; 35 *ib.* 373; Smith *v.* County Commissioners, 42 Maine, 395.

all district meetings.[1] So, where the record of a town stated the warning to have been on the 17th, and the meeting to have been held on the 19th, of January, parol evidence cannot be admitted to show that, by mistake, the clerk inserted the "19th" instead of the "29th." The remedy is, to have him correct the record, if in office, according to the truth.[2]

§ 237. But a *distinction* has sometimes been drawn between evidence to contradict facts stated on the record and evidence to show facts *omitted* to be stated upon the record. Parol evidence of the latter kind is receivable unless the law expressly and imperatively requires all matters to appear of record, and makes the record the only evidence.[3] Thus, in a well-considered case in the Supreme Court of the United States,[4]

[1] School District *v.* Atherton, 12 Met. 105, 1846; Morrison *v.* Laurence, 98 Mass. 219; Mahew *v.* Gayhead, 13 Allen, 129.

[2] Durfey *v.* Hoag, 1 Aiken (Vt.), 286, 1826. So in *Connecticut*, if a town corporation makes an erroneous record of its proceedings, this cannot be contradicted in a collateral action. In such an action the record is conclusive. If false, and the corporation will not correct the record, a party interested may, by *mandamus*, compel it to make the correction: Boston Turnpike Co. *v.* Pomfret, 20 Conn. 590, 1850. Upon this point, all the judges, though different on other points, seemed to agree. *Post*, Chap. XIX.

Purchasers of such paper [bonds issued by cities for stock in railroads] look at the form of the paper, the law which authorized it to be issued, and the *recorded* proceedings on which it is based. Therefore, as against purchasers, the record cannot be contradicted by parol evidence: *Per Clifford*, J., in Bissell *v.* Jeffersonville (action on municipal bonds), 24 How. (U. S.) 287, 298. See chapter on Contracts, *post*, as to the rights of holders of such securities.

[3] Moor *v.* Neufield, 4 Greenl. 44, 1826. "The only legal mode of proving *facts on record* is by the record itself, or by an attested copy of it." *Ib. per Mellen*, C. J.; School District *v.* Atherton, 12 Met. 105, 113, 1846, *per Dewey*, J.; Langsdale *v.* Bonton, 12 Ind. 467; Indianapolis *v.* Imberry, 17 Ind. 175, 179; Bigelow *v.* Perth Amboy, 1 Dutch. (N. J.) 297, 1855; Gearhart *v.* Dixon, 1 Pa. St. 224, 1845. Where the law or charter *requires* the clerk to keep *a journal* of all of the acts and proceedings of the city council, that, or a copy, is the proper evidence of the official doings of the body. City of Lowell *v.* Wheelock, 11 Cush. 391, 1853; Harris *v.* Whitcomb, 4 Gray, 433; Morrison *v.* Lawrence, 98 Mass. 219.

[4] Bank, &c. *v.* Dandridge, 12 Wheat. 64. Delivering the opinion of the court, Mr. Justice *Story*, *arguendo*, makes these important observations: "Would the omission of the corporation to record its own doings have

it was held, that the acts of a corporation might be proved otherwise than by their records or some written document, even although it was its duty "to keep a fair and regular record of its proceedings." The statute did not prescribe that nothing but a recorded vote or written document should bind

prejudiced the rights of the party relying upon the good faith of an actual vote of the corporation? If such omission would not be fatal to the plaintiff in suits against the corporation (as, in our opinion, it would not be), it establishes the fact, that acts of the corporation, not recorded, may be established by parol proofs, and, of course, by presumptive proofs. In reason and justice, there does not seem any solid ground why a corporation may not, in case of the omission of its officers to preserve a written record, give such proofs to support its rights as would be admissible in suits against it to support adverse rights. The true question in such case would seem to be, not which party was plaintiff or defendant, but whether the evidence was the best the nature of the case admitted of, and left nothing behind in the possession or control of the party higher than secondary evidence." "We do not admit, as a general proposition, that the acts of a corporation are invalid merely from an omission to have them reduced to writing, unless the statute creating it makes such writing indispensable as evidence, or to give them an obligatory force. If the statute imposes such restriction, it must be obeyed." (12 Wheat. 69, 74.) The same principle was applied, in the case of the United States *v.* Fillebrown, 7 Pet. 28, to the acts of boards of public agents or officers, and it was in that case accordingly held, that the board of commissioners of the navy hospital fund, not being required by law to reduce its proceedings to writing, in order to make them binding, oral evidence of such proceedings (no record having been made) was competent. Langsdale *v.* Bonton, 12 Ind. 467.

"It appears to us, that in the absence of *all record*, it might be competent for the defendants (trustees and collector of the corporation justifying under its proceedings) to show, by parol, the proceedings of the meeting. Where there is a record, it cannot be added to or varied by parol. Taylor *v.* Henry, 2 Pick. 403. But where there is an omission to make records, the rights of other persons acting under or upon the faith of a vote not recorded, ought not to be prejudiced. And it would seem that the right in such a case is reciprocal in the corporation and in those who claim adversely to it." *Per Williams*, C. J., Hutchinson *v.* Pratt, 11 Vt. 402, 421. But compare Stevens *v.* Eden &c. Society, 12 Vt. 688; 16 *Ib.* 439; 17 *Ib.* 337.

The rights of *creditors, or of third persons*, cannot be prejudiced, by the *neglect* of the council to keep proper minutes; against the corporation what the council in fact did, may be shown by evidence *aliunde* the record kept by it. Bigelow *v.* Perth Amboy, 1 Dutch. (N. J.) 297, 1855; San Antonio *v.* Lewis, 9 Texas, 69, 1852.

Proof of the action and orders of a municipal *board of health*, see chapter on Ordinances, *post*, Sec. 305, note.

the corporation or be received as evidence. Such written evidence was not deemed indispensable unless positively required. The direction to keep a record was regarded as directory.

§ 238. Where the records of a municipal corporation have been so carelessly and imperfectly kept as not to show the adoption of a resolution or other acts of the city council, and there is no written evidence in existence, *parol testimony* may be admitted; *e. g.* to show that certain work was done by authority of the city, by proving the passage of a resolution of the council, the appointment of a committee to make the expenditure, their report after the work was done, and its adoption by the council.[1]

§ 239. *Mandamus* is an appropriate remedy for the duly elected and authorized officer of a public or municipal corporation to compel the *delivery* to him by his predecessor, or by an usurper, of the *books*, *papers*, *records*, *and seal* pertaining to the

[1] Ross *v.* Madison, 1 Ind. (Carter) 281, 1848; Langsdale *v.* Bonton, 12 Ind. 467; Indianapolis *v.* Imberry, 17 Ind. 175, 179. In the same state, however, county commissioners and township trustees are required by law to keep a true record of their proceedings, and it is held that they "can only speak by their record" when legally assembled: County Commissioners *v.* Chitwood, 8 Ind. 504, 507, 1851; Trustees *v.* Osborne, 9 Ind. 458. So, in *Maine*, "school districts are required by law to keep a record of their proceedings by a sworn clerk, and such proceedings can be proved only by the record or a copy thereof duly authenticated:" Jordan *v.* School District, 38 Maine 164, 1854. The records of public or *quasi* corporations are not, in *Ohio*, considered to be "of that absolute verity that any person shall be estopped to show the truth in consequence of any matter which they contain" or omit to contain; and it was accordingly adjudged that the fact whether an official bond was received or refused and rejected may be shown by *parol* evidence, on which point the record was silent: Westerhaven *v.* Clive, 5 Ohio, 136, 1831, as to records of township trustees. See Green *v.* State, 8 Ohio, 310, 1838, in which it was queried, whether the county commissioners could appoint an agent by *parol* or only by record? In *Iowa*, it has been held that where no record entry is made such an appointment may be shown by parol testimony and that the agent acted accordingly: Poweshiek County *v.* Ross, 9 Iowa, 511; and see acc. Ross *v.* Madison, 1 Carter (Ind.), 281; compare Meeker *v.* Van Rensellaer, 15 Wend. 397. Where recording is not required by charter or law, resolutions of a council are admissible in evidence, although not recorded: Darlington *v.* Commonwealth, 41 Pa. St. 68. See *post*, Sec. 247.

office.[1] And such a corporation may maintain *replevin* in its name for the possession of its records; and this action is maintainable against a stranger or any officer or person not legally entitled to the custody of the records.[2]

§ 240. Concerning the right *to inspect corporate documents and papers*, the following points have been ruled as stated by Mr. Willcock: Every *corporator has a right to inspect* all the

[1] Proprietors of Church *v.* Slack, 7 Cush. 226, 239, 1851; Commonwealth *v.* Athearn, 3 Mass. 285; Rex *v.* Wildman, 2 Strange, 879; King *v.* Ingram, 1 W. Bl. 50; King *v.* Round, 4 Ad. & El. 139; Cranford *v.* Powell, 2 Burr. 1013; Rex *v.* Clapham, 1 Wils. 305; 3 Bl. Com. 310; Kimball *v.* Lamprey, 19 N. H. 215, 1848, where the above authorities are cited and digested by *Gilchrist*, C. J.; Taylor *v.* Henry, 2 Pick. 397; Parish, &c. *v.* Stearns, 21 Pick 148, 156; Bates *v.* Plymouth, 14 Gray, 163; Perkins *v.* Weston, 3 Cush. 549.

The following points have been ruled in respect to corporations in England: If the custody of their documents belong to one of their officers in virtue of his office, the corporation cannot compel him to deliver them up, but may require that he submit them to their inspection whenever they think proper: Rex *v.* Ipswich, 2 Ld. Raym. 1238; Rex *v.* Pigram, 2 Burr. 767; Willc. 345; Glover, 260. Sometimes the custody of these documents is entrusted to the town clerk or other officer, merely as the servant of the corporation, in which case they may appoint another to receive them, and if they are not delivered over after demand, the corporation may obtain possession of them by an action of *detinue*, or the court will compel a delivery by *mandamus*: *Ib.* If the predecessor in office, or, he being dead, his personal representative, or another person having possession of corporate documents under him, refuse to deliver them over to the successor or the corporation, on a proper application, the court will grant a *mandamus* to compel him to do so: Rex *v.* Nottingham, 1 Sid. 31; Anonymous, 1 Barnard, 402; Willc. 345; Glover, 260. This writ is said, indeed, to lie to any person, whether stranger or corporator, who happens to be in possession of the books of a corporation, and who refuses to deliver them up: Proprietors of Church *v.* Slack, 7 Cush. 226, 239, 1851, *per Fletcher*, J.; Rex *v.* Ingram, 1 W. Bl. 50; Willc. 346; Glover, 261. *Post*, Chap. XX.

[2] Parish, &c. *v.* Stearns, 21 Pick. 148; School District *v.* Lord, 44 Maine, 374 — replevin for records of district. Defendant claimed them as legal clerk of the district. The court, holding that *replevin* would lie, say: "The action is, therefore, rightfully brought, and may be maintained if the defendant was not the legal clerk of the district:" *Per Rice*, J., 44 Maine, 374, 384. The *right or title to an office* cannot be determined by a civil action between the respective claimants, as by an action of replevin for the official books and papers, and until the issue as to the right is determined by *quo warranto* or other proper proceeding, no suit in replevin can be maintained by one claimant against the other for the possession of the appurtenances of the office: Desmond *v.* McCarty, 17 Iowa, 525.

records, books, and other documents of the corporation, upon all proper occasions; and if, upon application for that purpose, the officer who has the custody refuse to show them, the court will grant a *mandamus* to enforce his right.[1] One who has a *prima facie title to a corporate office* has a right to inspect such documents as relate to that title, and may obtain a *mandamus* for this purpose before any suit has been instituted.[2] A corporator has a *right* to inspect these documents, to obtain information as to his rights, whether in dispute with a stranger or the corporation itself, or any of its members.[3] When the corporator's application to inspect is founded on his general right, he has a *mandamus*, but when it is founded on a suit pending, he obtains a rule.[4] In an action by one corporation against another, rules were made absolute for each corporation to inspect so much of the books and records as related to the subject in dispute.[5] The *motion for the rule to inspect* and to have copies should be supported by affidavits showing the foundation of the claim, the application, the proper officer and his refusal. The rule will require the expense attending obedience to be borne by the applicant, and will, in proper cases, allow the officer a remuneration for his trouble. If the officer disobey, without sufficient reason, the rule to allow an inspection or to give copy of, or to produce corporate documents, the court will grant an attachment against him.[6]

[1] Rex *v.* Shelley, 3 Term R. 142; Rex *v.* Babb, *ib.* 580; Harrison *v.* Williams, 3 Barn. & Cress. 162; Rogers *v.* Jones, 5 D. & R. 484; Willc. 347; Glover, 262. *Any person* sufficiently interested is entitled to inspect entries in books of public corporations relating to public matters of the corporation, where the evidence is required in a civil action: Grant, Corp. 311. See, also, People *v.* Cornell, 47 Barb. 329, in which it is held, that a corporator without any special or private interest has the right to inspect and take copies of all public documents and records under reasonable restrictions, to secure the safety of the originals.

[2] Rex *v.* Newcastle, 2 Stra. 1223; Rex *v.* Lucas, 10 East, 235; Rex *v.* Purnell, 1 Wils. 242. *Post*, Chap. XX.

[3] Edwards *v.* Vesey, Cas. Temp. Hardw. 128; Rex *v.* Babb, 3 Term R. 580; Rex *v.* Bridgman, 2 Stra. 1203; Grant on Corp. 312.

[4] Rex *v.* Shelley, 3 Term R. 142.

[5] Mayor of London *v.* Lynn Regis, 1 H. Bl. 206; Mayor, &c. of Southampton *v.* Graves, 8 Term R. 592.

[6] Willc. 352, 353; Grant, 311 *et seq.* See, also, People *v.* Mott, 1 How. Pr. R. 247; Cockburn *v.* Bank, 13 La. An. 289; People *v.* Walker, 9 Mich. 328.

§ 241. A public or municipal corporation, required by law to keep a record of its public, or official, proceedings, may itself use such *records as evidence* in suits to which it is a party; but the records must first be properly authenticated.[1] Indeed, in actions generally, including actions against agents or officers of the corporation, as individuals, the *original minutes* or

[1] School District *v.* Blakeslee, 13 Conn. 227, 1839; Denning *v.* Roome, 6 Wend. 651; Wood *v.* Jefferson County Bank, 9 Cow. 205; State *v.* Van Winkle, 1 Dutch. (N. J.) 73; McFarlane *v.* Insurance Company, 4 Denio, 392; Turnpike Company *v.* McKean, 10 Johns. 154; Denning *v.* Roome, above cited, holds, that the *original minutes* or records of the corporation of a city were competent evidence of corporate acts, without further proof of their verity. Records of corporation held admissible, though not required by law to be kept, and, where defective, explainable by parol evidence: Gearhart *v.* Dixon, 1 Pa. St. 224, 1845; Adams *v.* Mack, 3 N.H. 493, 499, *per Richardson*, C. J.

The following points have been decided respecting English corporations: Where charters or corporation books are to be given in evidence, being records or instruments of a *public nature*, they may themselves be produced; and examined copies of their contents may also be given in evidence. The Court of King's Bench will not make a rule to produce the originals, unless it be shown by affidavit that a new entry, rasure, or some other circumstance, renders an inspection necessary. To give books this public character, it must appear, if they be questioned, that they have been publicly kept, and that entries have been made by the proper officers; not but that entries made by other persons may be good, if the town clerk be sick or refuses to attend, which, however, must be proved, and the reason why they were not made by the proper officer shown: Rex *v.* Mothersell, 1 Stra. 93; Brocas *v.* Mayor, &c. of London, 1 Stra. 307; Rex *v.* Gwyn, Mayor, &c. 1 Stra. 401; Willc. 343; Glover, 258; Rex *v.* Smith, 1 Stra. 126; Grant, 318. Whoever produces the book must establish its authority before he delivers it in, and may be required to show where it has been kept, and how it came to his possession: Rex *v.* Mothersell, 1 Stra. 93; Rex *v.* Thetford, 12 Vin. Abr. 90, p. 16; Willc. 344; Glover, 258. A book containing minutes of some corporate acts which occurred ten years ago, entirely written by the relator's clerk, who was not an officer of the corporation, and appearing never to have been kept among, or esteemed as, one of the corporate documents, or even seen before the present application for an information, is not admissible as a corporate document: Rex *v.* Mothersell, 1 Stra. 93. Nor is the copy of a letter made fifty years ago and found in the corporation chest, but the original must be first accounted for, as though it had been found in the possession of a private person: Rex *v.* Gwyn, 1 Stra. 401. Nor are entries of a *private nature*, in the public books of a corporation, evidence for them in support of a right which they claim, for this were allowing the party to fabricate evidence for themselves: Rex *v.* Debenham, 2 B. & Ad. 187; Marriage *v.* Lawrence, 3 B. & Ad. 144; Grant on Corp. 318, 319, and cases; 2 Phill. Ev. 122; Angell & Ames, Corp. Sec. 679; Willc. 344.

records of the corporation are competent evidence of the acts and proceedings of the corporation. Duly *authenticated copies* have often been received in evidence, where the original document or proceeding was of a public nature.[1]

§ 242. An admission by a corporation of a fact or of a liability duly and properly made, is, of course, evidence against it. But a municipal corporation, by *accepting*, that is, *receiving the report of a committee* of inquiry, does not admit the truth of the facts stated therein; and such a report, though accepted by a

[1] Denning *v.* Roome, 6 Wend. 651, 1831; citing Owings *v.* Speed, 5 Wheat. 424; Rex *v.* Mothersell, 1 Stra. 93; 12 Vin. Abr. 90, pl. 16. See, also, People *v.* Adams, 9 Wend. 333; Wood *v.* Jefferson County Bank, 9 Cow. 194, 205; Angell & Ames on Corp. Sec. 679; Turnpike Company *v.* McKean, 10 Johns. 154. In Denning *v.* Roome, *supra*, the defendant was sued in his *individual capacity* for removing, by order of the city council, a certain fence erected by the plaintiff. The defendant (although it was argued that, being the agent of the corporation, the latter should be considered as the *party* and its own records as incompetent in its own favor to justify its acts) was allowed to show by the records of the corporation that the fence was on a portion of the public street.

The clerk of a city or town is, by law, the proper certifying officer to authenticate copies of the votes and ordinances thereof. Such copies are admissible in evidence without preliminary proof, as in ordinary instruments, of the genuineness of the clerk's signature, but are, of course, only *prima facie* evidence, and they may be shown to be inaccurate, false, or forged: Commonwealth *v.* Chase, 6 Cush. 248, 1850. Where the original document is of a public nature, and would be evidence if produced, it is not necessary to show the document itself, for it may be required many places at the same time; for that reason an immediate sworn copy, made by the proper officer, will be admitted: Rex *v.* Lord George Gordon, Doug. 593; 1 Phil. Ev. 405; Willc. 344; Glover, 259; Grant, 318, lays down the rule generally, that sworn copies of public entries in books of public corporations are admissible wherever the originals would be, and the corporation will not be compelled to produce their books in court except for reasons shown. It has, however, been held, that the by-laws of a corporation, in the absence of special provision, must be proved by the production of the by-laws themselves, as these are the primary evidence: Lumbard *v.* Aldrich, 8 N. H. 31; Moore *v.* Newfield, 4 Greenl. 44; Hallowell Bank *v.* Hamlin, 14 Mass. 178. So, of the votes of a corporation, the record is the best evidence: Haven *v.* Asylum, 13 N. H. 532. See, also, Manning *v.* Parish, 6 Pick. 6; Taylor *v.* Henry, 2 Pick. 403; Green *v.* Indianapolis, 25 Ind. 490. It may be remarked that there are statutes in various states under which certified copies would be receivable in evidence instead of the originals. Licenses from a city or town authorizing persons to pursue particular employments, &c., need not be in writing: Boston *v.* Schaffer, 9 Pick. 415, 1830.

vote of the corporation, is not admissible in evidence against it.[1] In an action of *assumpsit* against a town corporation, to support his cause of action, the plaintiff produced the books of the corporation, by which it appeared that the sum demanded in the declaration had been allowed by the council to the plaintiff on the 5th of September, on final settlement, at which time the plaintiff was present and assented to the settlement. The defendant contended that the resolution had been passed by mistake, and offered to show, by the same books, the passage, *three days afterwards*, in the plaintiff's absence, of a resolution rescinding the amount of the plaintiff's account. It was held that the subsequent resolution was not competent evidence, the court basing this opinion on the proposition that the books of a corporation are evidence against, but not in its favor, in an action against the corporation by a stranger.[2]

[1] Dudley *v.* Weston, 1 Met. 477, 1846; followed by Collins *v.* Dorchester, 6 Cush. 396, 1850; and both relating to defective highways. In the King *v.* Hardwick, 11 East, 578, a rated parishioner made a confession, which was admitted in evidence against the parish, on the ground that the parish was an aggregate corporation or company, of which he was a member: compare Mayor, &c. *v.* Long, 1 Campb. 68. But this is not the law in this country, and it may be safely laid down that the admission of a corporator cannot be received against the body: Hartford Bank *v.* Hart, 3 Day (Conn.), 493, denying King *v.* Hardwick, *supra;* Osgood *v* Manhattan Co. 3 Cow. 612, 623. But the admission of an *officer* when made in the ordinary course of his official duty and within the scope of his powers, may be admissible against the corporation: Peyton *v.* Hospital, 3 C. & P. 363; Angell & Ames on Corp. Sec. 309; *Ib.* Sec. 659. *Ante*, p. 211, note.

Notice to corporator or member is not notice to the corporation; it should be formally given as such to the authorized head or proper officer: Powles *v.* Page, 3 Com. B. 31; Edwards *v.* Railroad Co. 1 Myl. & Cr. 659; Grant, Corp. 315. Lancey brought an action for *libel* against the mayor and clerk of the city of Bangor for the following statement contained in their annual report: "Balance due from John Lancey, Collector, $6,004.50." The balance was shown to be less. It was held that there was no presumption of law that the officers of a city or town knew the contents of the city records, and no rule of law obliging them to be acquainted therewith, and unless the defendants made the publication maliciously they were entitled to a verdict: Lancey *v.* Bryant, 30 Maine (17 Shep.), 466, 1849. *Ante*, p. 211, note.

[2] Mayor *v.* Wright, 2 Port. (Ala.) 230, 1835; citing 1 Stark Ev. 292; but is not the proposition too broadly stated?

CHAPTER XII.

Municipal Ordinances or By-Laws.

§ 243. This subject will be considered under the following heads: —

1. Definition, General Nature, and Common Law Requisites of Ordinances — Secs. 244–264.

2. Of the Signing, Publication, and Recording — Secs. 265–269.

3. Of the Power to Impose Fines, Penalties, and Forfeitures — Secs. 270–287.

4. On Whom Binding, and Notice thereof — Secs. 288–290.

5. Ordinances Relating to the Licensing, Taxing, and Regulation of Amusements and Occupations, including the Sale of Intoxicating Liquors — Secs. 291–299.

6. Ordinances Relating to Public Offences — Secs. 300–302.

7. Ordinances Relating to the Public Health, Safety and Convenience: Herein of Hospitals, Cemeteries, and Burials; Nuisances; Markets, and Inspection Regulations; Dangerous Occupations and Practices; and of the Police Power and General Welfare Clause in Charters — Secs. 303–340.

8. Mode of Enforcing Ordinances: Herein of Actions and Prosecutions, and their Nature; Mode of Pleading Ordinances; Requisites of Complaints to Enforce Ordinances; Construction, Defences, Evidence, &c. — Secs. 341–355.

Definition, General Nature, and Common Law Requisites of Ordinances.

§ 244. *Definition.* — Under the general term of *ordinances* have been sometimes included all the regulations by which a corporation is governed, including special charter or statute regulations, as well as by-laws. In this country, the term ordinance is not usually applied, if ever, to charter or acts of the legislature respecting municipal corporations, regulating

their powers and mode of action, but is limited in its application to the acts, in the nature of local laws, passed by the proper assembly or governing body of the corporation. Indeed, in general and professional use, the term *ordinance* is almost, if not quite, equivalent in meaning to the term *by-law*, and is the word most generally used to denote the by-laws adopted by municipal corporations. According to Lord Coke, the word *by* or *bye* signifies a habitation, and thence a by-law in England, and a by-law or ordinance in this country, may be defined to be the law of the inhabitants of the corporate place or district, made by themselves or the authorized body, in distinction from the general law of the country or the statute law of the particular state.[1]

[1] Willc. 73; 2 Kyd, 95, 98.

Definition and Nature of Ordinances or By-Laws.— In a case in Massachusetts, denying to towns in that state power, under the statute to prohibit by ordinance the sale of intoxicating liquor, Mr. Chief Justice *Shaw* observed that the term "by-law" has a limited and peculiar meaning, and is used to designate those ordinances or regulations which a corporation, as one of its legal incidents, has power to make with respect to its own members and its own concerns. In respect to municipal and *quasi* corporations, this meaning has been somewhat extended, but even here the word is used to designate such ordinances and regulations as have reference to legitimate and proper municipal or corporate purposes. There is a broad distinction between the power of a public corporation to make "by-laws" and the general power to make "laws;" authority to make the former does not include the power to legislate upon general subjects: Commonwealth *v.* Turner, 1 Cush. 493. A municipal by-law, according to the definition of a distinguished English Judge, is a rule obligatory over a particular district, not being at variance with the general laws of the realm, and being reasonable and adapted to the purposes of the corporation; and any rule or ordinance of a permanent character which a corporation is empowered to make, either by the common or statute law, is a by-law: *Per Parke*, B., 19 Law J. (N. S.) Q. B. 135.

Resolutions and Ordinances Discriminated.— A *resolution* is an order of the council of a special and temporary character; an *ordinance* prescribes a permanent rule of conduct or government: Blanchard *v.* Bissell, 11 Ohio St. 96, 103, *per Scott*, J. Where the charter commits the decision of a matter to the council and is silent as to the mode, the decision may be evidenced by a *resolution*, and need not necessarily be by an *ordinance:* State *v.* Jersey City, 3 Dutch. (N. J.) 493, 1859. A *resolution* has ordinarily the same effect as an *ordinance*, as both are legislative acts: Sower *v.* Philadelphia, 35 Pa. St. 231, 1860; Gas Company *v.* San Francisco, 6 Cal. 190. Where the power to make ordinances and by-laws is general, and no form in which these shall be enacted or passed is prescribed, it was held that an *ordinance* containing a

§ 245. *Authority Delegated to Municipalities — Nature of Ordinances — Repeal.* — Although the proposition that the legislature of a state is alone competent to make laws is true, yet it is also settled that it is competent for the legislature to delegate to municipal corporations the power to make by-laws and ordinances,[1] which, when authorized, have the force, as to persons bound thereby, of laws passed by the legislature of the state.[2]

prohibition and annexing a penalty was valid, notwithstanding it purported by its terms to be a *resolution*. In substance it was an ordinance or regulation, and the form in which it was passed did not make it void: Municipality *v.* Cutting, 4 La. An. 335, 1849. By one section of the charter, the council were authorized to make "by-laws, ordinances, resolutions, and regulations," and by another "by-laws and ordinances" were to be submitted to the mayor for his approval, and it was held that there was no such distinction as to require that "by-laws and ordinances" must, and "regulations and resolutions" need not, be submitted to the mayor, to be approved by him: Kepner *v.* Commonwealth, 40 Pa. St. 124. The words "regulation," "resolution," and "ordinance," as used in the charter, defined by *Lowrie*, C. J.: *Ib.*

Mode of Exercising Power. — Where the power to do certain acts or pass certain ordinances is conferred upon the council, but the particular *mode* of exercising the power is not prescribed, this may be done by ordinance, and any mode may be adopted which does not infringe the charter or general law of the land. Thus, for example, power was given to a city "to levy and *collect* a special tax," not specifying the mode of collection; held that an ordinance requiring the mayor to enforce the collection of the tax by suit, in the nature of an action of debt, was valid, as it did not violate the charter or the general law: Cincinnati *v.* Gwynne, 10 Ohio, 192; Markle *v.* Akron, 14 Ohio, 586, 1846. Prescribed mode essential: Cross *v.* Morristown, 18 N. J. Eq. 305. *Post*, Chap. XIX.

[1] Perdue *v.* Ellis, 18 Geo. 586, 1855; St. Paul *v.* Coulter, 12 Minn. 41, 1866; Commonwealth *v.* Duquet, 2 Yeates (Pa.), 493; Hill *v.* Decatur, 22 Geo. 203; State *v.* Clark, 8 Fost. (N. H.) 176, 1854; Milne *v.* Davidson, 5 Martin (La.), 586, 1827; Marble *v.* Akron, 14 Ohio, 586, 590, 1846; Mayor, &c. *v.* Morgan, 7 Martin (La. O. S.), 1, *per Martin*, J.; Metcalf *v.* St. Louis, 11 Mo. 103, 1847. In Strauss *v.* Pontiac, 40 Ill. 301, 1866, the Supreme Court held that a provision in a town charter forbidding any person from doing a certain act, fixing the amount of fine, and prescribing the penalty, was a complete enactment of itself; that an ordinance to the same effect was void, and that a party could be prosecuted only under the charter, and not under the ordinance. In view of the general authority given in the same charter to make all ordinances necessary to carry into effect the powers granted in the charter, the correctness of this decision may admit of fair debate, although it is undoubtedly true that no ordinance is necessary where the prohibition in the charter is complete, the penalty fixed, and the remedy prescribed: Ashton *v.* Ellsworth, 48 Ill. 299.

[2] Heland *v.* Lowell, 3 Allen, 407, 1862; Church *v.* City, &c. 5 Cow. 538, 1826; St. Louis *v.* Boffinger, 19 Mo. 13, 15, *per Gamble*, J.; McDermott *v.*

§ 246. Ordinances, being among the most important and solemn acts of a corporation, it is essential to their validity that they shall be *adopted by the proper body*, duly assembled, and in the manner prescribed by the charter. What is necessary to constitute a valid corporate meeting, and the manner of performing valid corporate acts, are subjects treated of in another chapter.[1] When the mode of enacting ordinances is prescribed, it must be pursued. Thus, if the charter provides that no by-law shall be passed unless introduced at a previous regular meeting, this is a restriction on the power, and must be observed; and, accordingly, an ordinance for opening a street was adjudged void, on the ground that the name of one of the commissioners was changed without laying the ordinance over until another meeting.[2] Municipal ordinances otherwise valid, may, like an act of the legislature, be adopted to take effect in future and upon the happening of a contingent event.[3]

§ 247. In the absence of *record evidence of the passage of an ordinance*, it is not competent to establish its adoption by ex-

Board of Police, 5 Abb. Pr. R. 422, 1857. A city council is "a miniature general assembly, and their authorized ordinances have the force of laws passed by the legislature of the state:" *Per Scott*, J., Taylor *v.* Carondelet (forfeiture clause in lease), 22 Mo. 105, 1855. In Hopkins *v.* Mayor of Swansea, 4 M. & W. 621, 640, Lord *Abinger* said: "The by-law has the same effect within its limits, and with respect to the persons upon whom it lawfully operates, as an act of parliament has upon the subjects at large." Valid ordinances of corporations are as binding on the corporators and inhabitants of the place as the general laws of the state upon the citizens at large: Milne *v.* Davidson, 5 Martin (La.), 586, 1827. And, therefore, it has been held, that contracts between the inhabitants of a city in violation of the express provisions of a valid ordinance of a municipal corporation are illegal, and cannot be enforced: Milne *v.* Davidson (lease of house for private hospital), 5 Martin (La), 586, 1827; Heland *v.* Lowell, 3 Allen, 407, 1867; but compare Baker *v.* Portland, 10 Am. Law Reg. (N. S.) 559, and see Judge *Redfield's* note. The courts will not enjoin the passage of unauthorized ordinances, and will act only when steps are taken to make them available: Chicago *v.* Evans, 24 Ill. 52, 1860; Smith *v.* McCarthy, 56 Pa. St. 359.

[1] *Ante*, Chap. X.

[2] State *v.* Bergen, 33 N. J. (Law) 39, 1868, distinguished from State *v.* Jersey City, 2 Dutch. 448, where the variance was immaterial.

[3] Baltimore *v.* Clunet, 23 Md. 449, 1865; Railway Company *v.* Baltimore, 21 Md. 93, 1863; State *v.* Kirkley, 29 Md. 85, 1868. *Ante*, p. 63, Sec. 23.

trinsic testimony;[1] but where unanimity is necessary to legal authority to make an order, and an order is entered, it will be presumed, when the contrary does not appear, that it was made with the required unanimity.[2]

§ 248. Courts will not, in general, inquire into the *motives of members* of the council in passing ordinances.[3] But in Ohio, in a case where the legislature chartered a gas company, reserving the power of control, and subsequently empowered the city council to regulate the price of gas, the court considered the intention to be to limit the company to a fair and reasonable price, and that it must be fairly exercised, and if, in the colorable exercise of the power, a majority of the members, for a fraudulent purpose, combined to fix the price at a rate at which they knew it could not be made and sold without loss, their action would not bind the company, and in such a case, their good faith, it was held, might be inquired into.[4]

§ 249. Since a valid by-law never becomes obsolete, it remains in force until *repealed* by the legislature or the corporation. The power to make includes the power to repeal. The repeal cannot operate retrospectively to disturb private rights vested under it.[5] Therefore, the legislature having authorized

[1] Covington *v.* Ludlow, 1 Met. (Ky.) 295, 1858. See *ante*, Sec. 238.

[2] Lexington *v.* Headley, 5 Bush (Ky.), 508, 1869.

[3] Freeport *v.* Marks, 59 Pa. St. 253; Buell *v.* Ball, 20 Iowa, 282 (collateral action between third persons).

[4] State *v.* Cincinnati Gas Company, 18 Ohio St. 262, 1868, distinguished from Fletcher *v.* Peck, 6 Cranch. 87; Bank *v.* United States, 1 G. Greene, 553. The courts will not inquire, even on the complaint of the state, into the motives which governed members of the legislature in the enactment of a law, or allow to be shown, for the purpose of defeating the operation of the law, that it was passed by fraud, corruption, and bribery of the members: Wright *v.* Defrees, 8 Ind. 298; followed, McCulloch *v.* State, 11 *ib.* 424, 431, 1858; S P. Sunbury, &c. Railroad Company *v.* Cooper, 7 Am. Law Reg. 158, 1858.

[5] Rex *v.* Ashwell, 12 East, 22; 3 Term R. 198; State *v.* City Clerk, &c. 7 Ohio St. 355; Stoddard *v.* Gilman, 22 Vt. 568; Pond *v.* Negus, 3 Mass. 230. *Ante*, Chap. X.; State *v.* Graves, 19 Md. 351, 1862; Bigelow *v.* Hillman, 37 Maine, 52; Reiff *v.* Conner, 5 Eng. (Ark.) 241; Road Case, 17 Pa. St. 71, 75. An act changing an incorporated town into a city does not of itself repeal pre-existing ordinances: *Per Strong*, J., Trustees of Academy *v.* Erie, 31 Pa. St. 515, 1858. *Ante*, pp. 98, 99.

a religious corporation to establish a cemetery within the limits of a city, on obtaining the consent of the city, and such consent having been given, the city authorities cannot, after their consent has been acted upon, repeal the resolutions giving it, and enjoin the religious corporation from the use of the cemetery, unless, indeed, it is shown to be an actual nuisance, detrimental to the health of the city, in which case its police and governmental powers might doubtless be exercised.[1]

§ 250. *Mode of Conferring the Power — Construction of Grants of Authority.*— Municipal charters, or incorporating acts, are sometimes silent as to *the power to pass by-laws* or ordinances, and where this is the case, the municipal body has the power, incidental to all corporations, to enact appropriate by-laws. Occasionally, the charter or incorporating act, without any specific enumeration of the purposes for which by-laws may be made, contains a general and comprehensive grant of power to pass all such as may seem necessary to the well-being and good order of the place. More frequently, however, the charter or incorporating act authorizes the enactment of by-laws in certain specified cases and for certain purposes; and after this specific enumeration a general provision is added, that the corporation may make any other by-laws or regulations necessary to its welfare, good order, &c., not inconsistent with the constitution or laws of the state. This difference is essential to be observed, for the power which the corporation would possess under what may, for convenience, be termed, "the general welfare clause," *if it stood alone*, may be limited, qualified, or, when such intent is manifest, impliedly taken away by provisions specifying the particular purposes for which by-laws may be made. It is clear that the general clause can confer no authority to abrogate the limitations contained in special provisions. When there are both special and general provisions, the power to pass by-laws under the special or express grant can only be exercised in the cases, and to the extent, as respects those matters, allowed by the charter or incorporating

[1] New Orleans *v.* St. Louis Church, 11 La. An. 244, 1856, distinguished from Presbyterian Church *v.* Mayor, 5 Cow. 538; Musgrove *v.* Catholic Church, 10 La. An. 431 *Ante*, p. 110, Sec. 61.

act; and the power to pass by-laws under the general clause does not enlarge or annul the power conferred by the special provisions in relation to their various subject matters, but gives authority to pass by-laws, reasonable in their character, upon all other matters within the scope of their municipal authority, and not repugnant to the constitution and general laws of the state.[1] And it has been very properly held, that a special grant of power to a municipal corporation to adopt ordinances on enumerated subjects connected with municipal concerns, is in addition to the incidental power of the corporation.[2]

[1] State *v.* Ferguson, 33 N. H 424, 1856, where this subject is ably treated in a judgment delivered by Mr. Justice *Foster*, holding a by-law of the city of Concord, in relation to the sale of intoxicating liquor, invalid as contravening the special provisions of the charter, and therefore not sustainable under the general welfare clause of the charter.

"The power to make by-laws, when not expressly given, *is implied* as an incident to the very existence of a corporation, but in the case of an express grant of the power to enact by-laws limited to certain specified cases and for certain purposes, the corporate power of legislation is confined to the objects specified, all others being excluded by implication:" *Per Sawyer*, J., *arguendo*, in State *v.* Ferguson, 33 N. H. 424, 430, 1856; citing 2 Kyd on Corp. 102, Angell & Ames on Corp. 177, and Child *v.* Hudson's Bay Company, 2 P. Wms 207. The true rule in such cases *may*, perhaps, be correctly expressed to be, that the enumeration of special cases does not, unless the intent be apparent, exclude the implied power any further than necessarily results from the nature of the special provisions: Heisembrittle *v.* Charleston, 2 McMullen, 233; Wadleigh *v.* Gilman, 3 Fairf. (Maine) 408; State *v.* Clark, 8 Foster (N H), 176, and comments in 33 N. H. 432; State *v.* Freeman, 38 N. H. 426; Commonwealth *v.* Turner, 1 Cush. (Mass.) 493; Collins *v.* Hatch, 18 Ohio, 523. See New Orleans *v.* Philipi (taxation), 9 La. An. 44.

In Georgia, the Superior Courts adopt the following as the true rule for ascertaining *the extent of the power* of a city to pass ordinances. "The city council is restrained to such matters, whether specially enumerated or included under general grant, as are indifferent in themselves, such matters as are free from constitutional objection and have not been the subject of general legislation; or, as it is expressed in the charter, are not repugnant to the constitution or laws of the land:" Dubois *v.* Augusta (health ordinance), Dudley (Geo.) Rep. 30, 1831; Williams *v.* Augusta (powder ordinance), 4 Geo. R. 509, 514, 1848. Power to pass *necessary* by-laws is incidental, but this power is limited not only by the terms, but the spirit and design, of the charter, and the general principles and policy of the common law: Taylor *v.* Griswold, 2 Green (N. J.), 222, 1834; Mount Pleasant *v.* Breeze, 11 Iowa, 399, 1860, *per Wright*, J.

[2] State *v* Morristown, 33 N. J. (Law) 57, 1868 *Depue*, J., in his opinion, distinguishes such a case from Norris *v.* Staps, Hobart, 210, where the cor-

§ 251. *Ordinances cannot enlarge or change the Charter or Statute.*—Since all of the powers of a corporation are derived from the law and its charter, it is evident that *no ordinance or by-law of a corporation can enlarge, diminish, or vary, its powers.*[1] A similar rule obtains in England, where it is held, that neither the king's charter nor any by-law can introduce an alteration in rules which have been prescribed to a corporation by an act of parliament.[2] By-laws are, in their nature, strictly local, and subordinate to the general laws.

poration was created by the Crown, and where it was held that a special clause in the letters patent authorizing the corporate body (a fellowship of weavers) to make by-laws, did not add to implied powers, and that its by-laws were subject to the general law of the realm and subordinate to it. "But," he adds, "a special grant of power to a municipal corporation is an entirely different thing; it is a delegation of authority to legislate by ordinance on the enumerated subjects, and does add to the powers incident to the creation of the corporation. The numerous instances, in our own state, of the grant of such powers in relation to the opening and improvement of streets, the making of sewers, and the assessment of taxes, afford illustrations of this distinction." *Ib.* 62.

[1] Thompson *v.* Carroll, 22 How. 422, 1859; Andrews *v.* Insurance Company, 37 Maine, 256, 1854; Thomas *v.* Richmond, U. S. Supreme Court, Dec T. 1871, not yet reported. "A power vested by legislation in a city corporation, to make by-laws for its own government and the regulation of its own police, cannot be construed as imparting to it the power to repeal the [general] laws in force, or to supersede their operation by any of its ordinances. Such a power, if not expressly conferred, cannot arise by mere implication, unless the exercise of the power given be inconsistent with the previous law, and does necessarily operate as its repeal *pro tanto*. Nor can the presumption be indulged, that the legislature intended that an ordinance passed by the city should be superior to, or take the place of, the general law of the state upon the same subject:" *Simpson*, C. J., March *v.* Commonwealth, 12 B. Mon. 25, 29, 1851 "Huckster" means a petty dealer or retailer of small articles of provisions, &c., and an ordinance cannot enlarge the ordinary meaning so as to embrace "any person not a farmer or butcher who should sell, or offer for sale, any commodity not of his own manufacture," and subject such person to a penalty; it not being, says *Ranney*, J., "part of the franchise of municipal corporations to change the meaning of English words:" Mays *v.* Cincinnati, 1 Ohio St. 268, 272, 1853.

[2] Rex *v.* Miller, 6 Term R. 277; Rex *v.* Barber Surgeons, 1 Ld. Raym. 585. It has even been said that the general assembly cannot authorize a municipal corporation to repeal, by ordinance, a statute of the state: Haywood *v.* Mayor, &c. 12 Geo. 404, *per Lumpkin*, J. But it may provide that on the passage of an ordinance of a certain character, the state law on the subject shall not be in force in the corporate limits: State *v.* Binder, 38 Mo. 450.

§ 252. *Ordinance Need not Recite Authority to Pass it.—It is not essential to the validity* of an ordinance executing powers conferred by the legislature, that it should state the power, in execution of which the ordinance is passed. If it state no particular power as its basis, it will be judicially regarded as emanating from that power which would have warranted its passage. If two such powers exist, it may be imputed to either, in conformity to which its provisions and pre-requisites show that it has been adopted. If, in these respects, in accordance with both, no injustice can result in regarding it as the offspring of both, or either of the powers.[1]

§ 253. *Must be Reasonable and Lawful.*—In England, the subjects upon which by-laws may be made were not usually specified in the king's charter, and it became an established doctrine of the courts that every corporation had the implied or incidental right to pass by-laws, but this power was accompanied with these limitations, namely, that *every by-law must be reasonable*, not inconsistent with the charter of the corporation, nor with any statute of parliament, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject or the rights of private property.[2] In this country the courts have often affirmed the general incidental power of municipal corporations to make ordinances, but have always declared that ordinances passed in virtue of the implied power must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the state.[3]

[1] *Per Dorsey*, C. J., Methodist P. Church *v.* Baltimore, 6 Gill (Md.), 391, 1848. Under power to pass an ordinance if found *necessary*, the *necessity* for its enactment being implied from its mere passage need not be recited in the ordinance, nor averred in proceedings to enforce it: Stuyveysant *v.* Mayor, &c. of New York, 7 Cow. 588. So, in England it is not necessary that the preamble to a by-law should state the reasons for making it: Rex *v.* Harrison, 3 Burr. 1328.

[2] Sutton's Hospital Case, 10 Rep. 31 *a;* Feltmakers *v.* Davis, 1 Bos. & P. 98, 100; Norris *v.* Stops, Hob. 211; Rex *v.* Maidstone, 3 Burr. 1837; Com. Dig. Franch. F. 10; London *v.* Vanacre, 1 Ld. Raym. 496; 2 Kyd, Chap. IV. Sec. 10, p. 95, and cases cited; Bac. Abr. Tit. By-Law.

[3] *Must be Reasonable:* Kip *v.* Patterson, 2 Dutch. (N. J.) 298; Commissioners *v.* Gas Co. 12 Pa. St. 318, 1849; Fisher *v.* Harrisburg, 2 Grant (Pa.) Cases,

§ 254. *Must not be Oppressive.*— The principle of law, that ordinances passed under the general authority to enact all such as may be necessary, must be reasonable, or they will be void, is well illustrated by a case in Pennsylvania.[1] A municipal corporation passed two ordinances in relation to a gas company—a private corporation, with a special charter authorizing the construction and maintenance of suitable gas works within the limits of the municipal corporation, and the use of the streets for the laying down of pipes. The first ordinance prohibited the gas company from opening paved streets from December to March in each year, for the purpose of laying gas mains. This ordinance the court considered to be reasonable, in view of the difficulty of repairing the paved streets during the winter months. And the other ordinance prohibited the gas company from opening a paved street at any time, for the purpose of laying pipes from the main to the opposite side of the street. The court say: "The effect of this ordinance is, to compel the company to construct two mains, one on each side

291, 1854; Commonwealth *v.* Roberston, 5 Cush. 438, 1850; Waters *v.* Leech, 3 Ark. 140; Mayor *v.* Winfield, 8 Humph. (Tenn.) 767, 1848; People *v.* Throop, 12 Wend. 183, 186, 1834; Mayor *v.* Beasley, 1 Humph. 232, 1839; State *v.* Freeman, 38 N. H. 426, 1859; White *v.* Mayor, &c. 2 Swan (Tenn.), 364, 1852; Pedrick *v.* Bailey, 12 Gray (Mass.), 161; Dunham *v.* Rochester, 5 Cow. 462.

Must not conflict with the charter or statute, or be repugnant to fundamental rights: Dubois *v.* Augusta, (health ordinance) Dudley (Geo.), R. 30, 1831; Williams *v.* Augusta (powder ordinances), 4 Geo. 509, 1848; Adams *v.* Mayor, &c. (liquor statute), 29 Geo. 56; Taylor *v.* Griswold, 2 Green (N. J.), 222, 1834; New Orleans *v.* Philpi (taxation), 9 La. An. 44; Perdue *v.* Ellis (liquor traffic), 18 Geo. 586; Haywood *v.* Mayor, 12 Geo. 404; Paris *v.* Graham (tax on dram-shops), 33 Mo. 94; St. Louis *v.* Cafferata, 24 Mo. 94; St. Louis *v.* Benton, 11 Mo. 61; Carr *v.* St. Louis (fee of officers), 9 Mo. 1845; Marietta *v.* Fearing (estray animals), 4 Ohio, 427, 1831; Collins *v.* Hatch (animals at large), 18 Ohio, 523, 1849; Mayor, &c. of New York *v.* Nichols (inspection laws), 4 Hill, 209, 1843; Commonwealth *v.* Turner (liquor traffic), 1 Cush. 493, 1848; Phillips *v.* Wickam, 1 Paige, 590; Howard *v.* Savannah, T. Charlt. R. 173; Smith *v.* Knoxville, 3 Head (Tenn.), 245, 1859; Cowen *v.* West Troy, 43 Barb. 48, 1864; Pesterfield *v.* Vickers, 3 Coldw. (Tenn.) 205; City Council *v.* Benjamin, 2 Strob. (South Car.) 521; City Council *v.* Ahrens, *ib.* 241; Heisembrittle Ads. *v.* City Council, 2 McMul. (South Car.) 233; City Council *v.* Goldsmith, 2 Speer (South Car.), 435. An ordinance prohibiting heavy *awnings* over sidewalks, without consent of municipal authorities, is reasonable and valid: Pedrick *v.* Bailey, 12 Gray, 161.

[1] Commissioners of North Liberties *v.* Gas Company, 12 Pa. St. 318, 1849.

of the street, instead of one, thereby materially increasing the expense to the company, and consequently enhancing the price of gas to the inhabitants of the district." And this ordinance was declared to be void.

§ 255. Courts will declare void ordinance that are *oppressive* in their character. Thus, the Supreme Court of Tennessee, in a judgment which reflects credit upon the tribunal that pronounced it, declared void an ordinance of the city of Memphis which ordered the arrest, imprisonment, and fine of all free negroes who might be found out after ten o'clock at night, within the limits of the corporation.[1]

§ 256. *Must be Impartial, Fair, and General.*—As it would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal, and if done by another not so, ordinances which have this effect cannot be sustained. *Special and unwarranted discrimination*, or unjust or oppressive interference in particular cases is not to be allowed. The powers vested in municipal corporations should, as far as practicable, be exercised by ordinances general in their nature and impartial in their operation.[2]

[1] Mayor *v.* Winfield, 8 Humph. (Tenn.) 767, 1848. The oppressiveness and inequality, alleged to invalidate a by-law, must be made apparent to the court: Mayor *v.* Beasley, 1 Humph. (Tenn.) 232, 1839; St. Louis *v.* Weber, 44 Mo. 547, 1869. A by-law prohibiting swine running at large in a city is presumptively reasonable as a sanitary or police regulation: Commonwealth *v.* Patch, 97 Mass. 221; Commonwealth *v.* Bean, 14 Gray, 52.

[2] Russ *v.* Mayor, &c. of New York, 12 N. Y. Leg. Obs. 38; White *v.* Mayor, 2 Swan (Tenn.), 364, 1852; De Ben *v.* Gerard, 4 La. An. 30; Chicago *v.* Rumpff, 45 Ill. 90; Mayor, &c. of Hudson *v.* Thorne, 7 Paige, 261. Ordinances should be general, or, at all events, not discriminating in their operation. They may, it is said, impose fines on persons violating their provisions within the corporation or within a designated district therein, or in a certain street; but an ordinance naming one individual and directing him to do certain acts with respect to a building alleged to be a nuisance, and in default of compliance, imposing a fine of a specific amount upon him, was held to be unreasonable, contrary to common right, and void: Municipality *v.* Blineau, 3 La. An. 688, 1848. Compare Bozant *v.* Campbell, 9 Rob. (La.) 411, 1845, where, without repealing an ordinance prohibiting private hospitals, the grant of permission to one or more individuals to erect such hospitals, was sustained. And see, also, Commonwealth *v.* Goodrich, 13 Allen, 545, where a municipal regulation, limited in its character,

§ 257. *May Regulate, but not Restrain, Trade.*— In *England*, certain customs prevail in prescriptive corporations restrictive of freedom of trade and against common right. Such customs, from long usage and unknown origin, are regarded in the light of regulations prescribed by a charter which is supposed to have existed, but is lost. Such customs, while not favored by the English courts, are yet held legal, but must be incontrovertibly established. But by the Municipal Corporations Act of 1835 (5 & 6 Will. IV. Chap. LXXVI. Sec. 14),[1] exclusive rights of trading have been abolished, and it is enacted, "that notwithstanding such custom or by-law [to the contrary], every person in any borough may keep any shop for the sale of all lawful wares and merchandise, by wholesale or retail, and use every lawful trade, occupation, mystery, and handicraft, for hire, gain, sale, or otherwise, within any borough."

§ 258. In *this country* corporations derive all their powers from legislative acts of comparatively modern date, and prescriptive customs, in restraint of trade or against common right, are unknown. No inconsiderable portion of the cases in the old books in England relate to these customs, their validity and mode of proof, but they are, in the main, inapplicable to the present period and to the institutions in this country, where freedom in the choice and pursuit of all occupations never has been denied. The inapplicability of the English decisions is noticed by Mr. Justice *Dewey* in delivering the opinion of the Supreme Court of Massachusetts in an important case involving the validity of an ordinance of the city of Boston regulating the use of hackney coaches and other vehicles within the city. He observes, that "in the arguments addressed to the court, the question was somewhat discussed as to the power incident to municipal corporations to create by-laws

was considered valid. In exercising its power to require adjacent lot owners to make local improvements, the corporation, it has been held in Tennessee, must not act in a partial and oppressive manner; therefore it cannot select particular individuals by name, and require them to construct pavements or local improvements in front of their lots, and omit others in the same improvement district, if this be done without good cause or reason for the distinction: White *v.* Mayor, &c. 2 Swan (Tenn.), 364, 1852.

[1] *Ante*, Chap. III. p. 51.

of the character here adopted; and a reference was made to various cases in the English courts, where questions of this nature had arisen. Upon examination of those cases, they will be found less important and less satisfactory as guides here, inasmuch as it is quite obvious that in many of them, and particularly those where the ordinance seemed most questionable as not being within the ordinary exercise of municipal authority, the by-laws were sustained upon the ground of ancient and long-continued usage, ripening into a prescriptive right on the part of the municipal corporation." But "no such ground," he adds, "can be urged here, and the present ordinance, if sustained at all, must be shown to be authorized by the express provision of the charter, or be derived as an incidental power resulting from its incorporation as a city, or be found in some general or special statute." [1]

§ 259. *Must not Contravene Common Right.*— An ordinance cannot legally be made which contravenes a common right, unless the power to do so be plainly conferred by legislative grant; and in cases relating to such a right, authority to regulate conferred upon towns of limited powers, has been held not necessarily to include the power to prohibit.[2] Thus, in Connecticut, it is held that every one has, presumptively, a

[1] Commonwealth *v.* Stodder, 2 Cush. 562, 568, 1848. See as to English decisions, remarks of *Rhodes*, J., in Herzo *v.* San Francisco, 33 Cal. 134, 145, 1867. In the case first cited the court decided that the business of *carrying persons for hire* from town to town, in stage coaches and omnibuses, is not so far a territorial or local occupation as will authorize one city, unless it has express and direct authority so to do from the legislature, to pass an ordinance requiring the inhabitants of other towns to obtain from it a license before exercising that employment in carrying persons to or from it. Such an ordinance was considered to be an unnecessary restraint upon business, and is not binding upon citizens of other places. The court does not question the right of the city, by reasonable by-laws, to require *inhabitants*, whose business is local and carried on within the city, to obtain a license before exercising certain employments: *Per Dewey*, J., 2 Cush. 562, 575.

Whenever a by-law seeks to *alter a well settled* and fundamental *principle of the common* law, or to establish a rule interfering with the rights of individuals or the public, the power to do so must come from plain and direct legislative enactment: Taylor *v.* Griswold, 2 Green (N. J.), 222, 1834. *Ante*, p. 101, Sec. 55, and note.

[2] Taylor *v.* Griswold, 2 Green (N. J.), 222, 1834.

common law right to fish in navigable rivers, and that though every town may, by statute, have the power to make by-laws to *regulate* fisheries of clams and oysters within its limits, yet this power does not authorize a by-law *prohibiting all persons*, except its own inhabitants, from taking shell-fish in a navigable river, within the limits of such town; such a by-law, being in contravention of a common right, is void.[1]

§ 260. But there is, however, *no common right* to do that which, by a valid law or ordinance, is prohibited; and hence courts will not declare an authorized ordinance void because it prohibits what otherwise might lawfully be done. In discussing this subject, Mr. Justice *Evans* illustrates it in this wise: "If there was no law interfering, the butcher might kill his beeves and hogs in the street. If the butcher could do it any man might, and it might, therefore, be said to be a common right; but when the law prohibited it, it was no longer a common right. A legal restraint may be imposed on a few for the benefit of the many."[2]

§ 261. *Validity is for the Court, and not the Jury, to Determine.* —Whether an ordinance be reasonable and consistent with the law or not, is a question for the court, and not the jury, and evidence to the latter on this subject is inadmissible. But in determining this question the court will have regard to all the circumstances of the particular city or corporation, the objects sought to be attained, and the necessity which exists for the ordinance. Regulations proper for a large and populous city might be absurd or oppressive in a small and sparsely populated town, or in the country. An unreasonable by-law is void.[3]

[1] Hayden *v.* Noyes, 5 Conn. 391, 1824; Peck *v.* Lockwood, 5 Day (Conn.), 22; Willard *v.* Killingworth, 8 Conn. 247. *Ante*, p. 101, Sec. 55.

[2] *Per Evans*, J., in City Council *v.* Ahrens, 4 Strob. (South Car.) Law, 241, 257, 1850; City Council *v.* Baptist Church, *ib.* 306, 310; Peoria *v.* Calhoun, 29 Ill. 317, 1862; St. Paul *v.* Coulter, 12 Minn. 41, 1866.

[3] Bacon Abr. Tit. By-Law; Commonwealth *v.* Worcester, 3 Pick. 462, 1826; Paxson *v.* Sweet, 1 Green (N. J.), 196, 1832; Vandine, Petitioner, &c. 6 Pick. 187, 1828; Boston *v.* Shaw, 1 Met. 130, 135, 1840; Austin *v.* Murray, 16 Pick. 121, 125, 1834; Hudson *v.* Thorne, 7 Paige, 261; Commonwealth *v.* Stodder, 2 Cush. 562, 575, 1848; Commonwealth *v.* Gas Company, 12 Pa. St.

§ 262. *Legislative Authority to Adopt Unreasonable Ordinances.*—Where the legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the constitution, an ordinance passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words, what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it unreasonable. But where the power to legislate on a given subject is conferred, but the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid.[1]

§ 263. *Must be Consistent with Public Legislative Policy.*—The rule that a municipal corporation can pass no ordinance which conflicts with its charter or any general statute in force and applicable to the corporation has been before stated. Not only so, but it cannot, in virtue of its incidental power to pass by-laws, or under any general grant of that authority, adopt by-laws which infringe the spirit or are repugnant to the policy of the state as declared in its general legislation. This principle is well exemplified by a case in Ohio,[2] in which incorpora-

318; Dunham *v.* Rochester, 5 Cow. 462, 465, 1826; Buffalo *v.* Webster, 10 Wend. 100.

"Where the municipal legislature has authority to act, it must be governed, not by our discretion, but by its own; and we shall not be hasty in convicting them of being unreasonable in the exercise of it:" *Per Lowrie*, J., Fisher *v.* Harrisburg, 2 Grant (Pa.) Cas. 291, 1854; S. P. St. Louis *v.* Weber, 44 Mo. 547. "The courts," says *Dewey*, J., "doubtless have the power to deny effect to a by-law obnoxious to the objection that it is unreasonable. It is, however, a power to be cautiously exercised," especially where the question is a practical one—for example, the length of time which ought to be allowed to vehicles to remain in the street, and as to which the city authorities, it is to be presumed, can judge better than the court: Commonwealth *v.* Robertson, 5 Cush. 438, 442, 1850. See, also, Vintners *v.* Passey, 1 Burr. 239; Workingham *v.* Johnson, Cas. Temp. Hardw. 285; Poulter's Co. *v.* Phillips, 6 Bing. (N. C.) 314; St. Paul *v.* Coulter, 12 Minn. 41; Commonwealth *v.* Patch, 97 Mass. 221.

[1] Peoria *v.* Calhoun, 29 Ill. 317, 1862; St. Paul *v.* Coulter, 12 Minn. 41, 1866.

[2] Marietta *v.* Fearing, 4 Ohio, 427, 1831.

ted towns were, by statute, prohibited from subjecting stray *animals* owned by persons not residents of such towns to their corporation ordinances. It was held that an ordinance operating, not on the animals but on the non-resident *owner*, in the shape of a penalty, violated the spirit of the statute, and was void. So, in a later case in the same state, it was shown that the general policy of the state was to allow animals to run at large; and it was ruled that a municipal corporation with power to pass "all by-laws deemed necessary for the well regulation, health, cleanliness, &c.," of the borough, and with power to "abate nuisances," had no authority to pass a by-law restraining cattle from running at large, such a by-law being in contravention of the general law of the state.[1]

§ 264. The general statutes of the state abolished the system of inspecting hay, and, in the place of it, the seller was required to prepare the article for market in a particular manner at the peril of being subjected to certain designated penalties. In other words, he was at liberty to dispose of his hay without inspection if he chose to do so. Under these circumstances it was decided that a city ordinance prohibiting the

[1] Collins *v.* Hatch, 18 Ohio, 523, 1849. But in Illinois it has been decided that a town, authorized by its charter to declare what should be nuisances, and to provide for the abatement thereof by ordinance, may pass an ordinance declaring swine running at large within the corporation to be nuisances, and providing for the taking up of the same, &c., and this though under the laws of the state the owners of stock may lawfully allow it to run at large upon the common—the court regarding the power named in the charter as abridging or limiting any right of common which might otherwise exist: Roberts *v.* Ogle, 30 Ill. 459, 1863. By-laws which contravene the policy of the general statutes of the state, by undertaking to punish acts which those statutes authorize, are void: Canton *v.* Nist, 9 Ohio St. 439, holding void a by-law, which, disregarding the statutory exceptions of cases of necessity, charity, &c., prohibited the opening of shops for business on Sunday. Followed, Thompson *v.* Mount Vernon, 11 *ib.* 688, adjudging an ordinance to be invalid because inconsistent with the liquor law of the state. And see, Adams *v.* Mayor, &c. 29 Geo. 56; Sill *v.* Corning, 1 E. P. Smith (N. Y.), 297; Cincinnati *v.* Gynne, 10 Ohio, 290; Wood *v.* Brooklyn, 14 Barb. 425; Markle *v.* Akron, 14 Ohio, 586; Thomas *v.* Richmond, U. S. Sup. Ct. Dec. Term, 1871, not yet reported. But a corporation may, in some cases, consistently with general law, further regulate by ordinance subjects already regulated by statute: Huddleson *v.* Ruffin, 6 Ohio St. 604; Rogers *v.* Jones, 1 Wend. 237.

sale of pressed hay *without inspection* was void, because it *conflicted with the laws of the state* upon the same subject.[1]

Of the Signing, Publication, and Recording of Ordinances.

§ 265. *Signing, Publication, and Recording.*—When ordinances are required to be published before they shall go into effect, this requirement is essential, and the publication must be in the designated mode. Until such publication be made, or until they have gone into operation, no penalty can be enforced under them.[2] Whether the mayor's signature is essential to the validity of an ordinance depends upon the charter, but unless made essential, such provisions, where the ordinance is duly enacted, have sometimes been regarded as directory.[3]

§ 266. Where *alternate modes* of publication of a by-law are allowed by statute, and the statute requires the *corporation* to direct which mode shall be adopted, a publication made by order of the clerk, without direction from, or selection of, the mode having been made by the corporation, is not valid.[4]

[1] Mayor, &c. of New York *v.* Nicholls, 4 Hill (N. Y.), 209, 1843. Compare, Mayor *v.* Hyatt, 3 E. D. Smith, 156; Rogers *v.* Jones, 1 Wend. 287.

[2] Barnett *v.* Newark, 28 Ill. 62, 1862; Conboy *v.* Iowa City, 2 Iowa, 90, 1855; Higley *v.* Bunce, 10 Conn. 567, 1835. Failure to publish ordinance held not to affect validity of bonds issued under a subsequent act authorizing the corporation to incur a debt: Amey *v.* Allegheny City, 24 How. 364; Clark *v.* Janesville, 10 Wis. 136, 1859; State *v.* Newark, 1 Vroom (N. J.), 303; People *v.* San Francisco, 27 Cal. 655.

[3] Blanchard *v.* Bissell, 11 Ohio St. 96, 101, 103, 1860; Striker *v.* Kelly, 7 Hill, 9; Elmendorf *v.* Mayor of New York, 25 Wend. 693. See, however, Conboy *v.* Iowa City, *supra;* State *v.* Newark, 1 Dutch. 399; State *v.* Hudson, 5 Dutch. 475; Kepner *v.* Commonwealth, 40 Pa. St. 124; State *v.* Jersey City, 1 Vroom, 93; Creighton *v.* Manson, 27 Cal. 613; Taylor *v.* Palmer, 31 Cal. 241; Dey *v.* Jersey City, 19 N. J. Eq. 412; Gas Company *v.* San Francisco, 6 Cal. 190. See *ante*, chapter on Corporate Meetings. Signing *minutes* not equivalent to signing resolution, when latter is essential: Graham *v.* Carondelet, 33 Mo. 262, 1862. When to be signed: Miles *v.* Bough, 3 Gale & D. 119; Inglis *v.* Railway Company, 16 Eng. Law & Eq. 55. A legislative provision requiring the *presiding officer* of the council *to sign* all ordinances, is directory in its nature. If regularly passed, an ordinance is valid, though not thus authenticated. It is, of course, competent for the legislature to make the signature an essential condition of validity: Blanchard *v.* Bissell, 11 Ohio St. 96, 101, 103, 1860. See State *v.* Newark, 1 Dutch (N. J.) 399. *Ante*, Sec. 209, note.

[4] Higby *v.* Bunce (restraining cattle), 10 Conn. 435; S. C. *ib.* 567, 1835. The language of the statute was this: "Such by-laws shall not be in force

§ 267. A municipal charter required every ordinance *to be published* for the space of *twenty days* in at least one newspaper before it should go into effect; and it was held that an ordinance would go into force in twenty days after its publication in the first number of the paper; that twenty days need not intervene between the first and last insertions; that it is clearly sufficient if it be published in each number of the paper issued within the twenty days, and probably sufficient if there is but one insertion, twenty days after which the ordinance will go into effect.[1]

§ 268. A charter provided that no ordinance should be in force until published in some newspaper of the place, and also declared that ordinances should be sufficiently proved in any court (among other modes) by a printed copy taken from the newspaper or printed pamphlet in which the same had been published, provided the same purports to have been done by authority of the corporation. Under this provision, the production of a newspaper published in the town, containing what appears as an ordinance, with a caption, "Published by Authority," duly signed, *is evidence* of the existence and adoption of the ordinance.[2]

§ 269. A provision in a statute changing an incorporated town into a city, that the existing town ordinances shall remain in force provided they shall be *recorded* within four months thereafter, is merely directory, and such ordinances are valid

until published four weeks in a newspaper printed in such town, or in the town nearest to such town in which a newspaper is printed, *or* in some other newspaper generally circulated in the town where such by-law is made, *as the town shall direct*:" Rev. 1821, p. 458. Held, that the *town* must point out one of the three descriptions of newspapers in which the by-law should be printed: *Ib.*

[1] Hoboken *v.* Gear, 3 Dutch. (N. J.) 265, 1859. Where a city is required to *promulgate* its ordinances, it is sufficient to publish them in the newspaper in which the ordinances are *usually* published, though there may be other newspapers within the city: Truchelut *v.* City Council, 1 Nott & McC. (South Car.) 227, 1818.

[2] Block *v.* Jacksonville, 36 Ill. 301, 1865. See Pendegast *v.* Peru, 20 Ill. 51. Proof of publication under special charter provision: President, &c. *v.* O'Malley, 18 Ill. 407.

though not recorded within the designated period.[1] Nor is it a valid objection to a municipal ordinance that it is recorded in print (being printed and pasted in the proper book), and not in manuscript.[2]

Of the Power to Impose Fines, Penalties, and Forfeitures.

§ 270. *Common Law Principles Adopted.*— That by-laws or ordinances may not be inoperative or useless, it is necessary that some penalty should be annexed to the breach of them; and it is settled in England, in accordance with the principles of Magna Charta, that without the express sanction of parliament no by-law can be enforced by disfranchisement of the offender, or by his imprisonment, or by forfeiture of his goods or property. Under its incidental power to pass by-laws, a corporation may, in England, annex pecuniary penalties of a certain fixed and reasonable character, but without express authority given by a statute, the only penalty it can prescribe is a pecuniary one, usually called a fine. Therefore, in the absence of a statute or special custom justifying it, a by-law cannot give a power of distress and sale of the goods of the offender, since such a power is contrary to the common law. And where a corporation is empowered to enforce its by-laws, in a special manner, as by fine, it is limited to the manner prescribed. These safe, salutary, and enlightened principles of law have been recognized by the American courts as applicable to the ordinances of our municipal corporations, as the cases to which reference will be made fully show.

§ 271. By the *Municipal Corporations Act*, the subject of by-laws and their penalties is regulated. It is declared, "that it shall be lawful for the council of any borough to make such by-laws as shall to them seem meet for the good rule and government of the borough, and for the prevention and suppression of all such nuisances as are not already punishable in a

[1] Trustees of Academy *v.* Erie, 31 Pa. St. 515, 1858; Amey *v.* Allegheny City, 24 How. 364. See chapter on Corporate Records and Documents, *ante*.

[2] Ewbanks *v.* Ashley, 36 Ill. 177, 1864. Parol evidence of resolutions is competent where the charter does not require them to be recorded, and no record thereof has been made: Darlington *v.* Commonwealth, 41 Pa. St. 68.

summary manner by virtue of an act in force throughout such borough, *and to appoint, by such by-laws, such fines* as they shall deem necessary for the prevention and suppression of such offences; provided that no *fine*, to be so appointed, *shall exceed the sum of five pounds*, and that no such by-law shall be made, unless at least two-thirds of the whole number of the council shall be present."[1] Respecting the fines mentioned in this section, Mr. Rawlinson suggests the inquiry whether it be necessary or not that the *exact amount* of each fine should be mentioned in the by-law, the limit, to-wit, 5*l.* being fixed by the act. It is contended, he observes, by some persons, that the amount may be left open, and that a by-law enacting that the offence shall be punishable by a fine not less than 10*s.* and not exceeding 5*l.* would be valid. This would be convenient, but some have doubted whether such a by-law would be certain, and whether the corporation could enforce it by the usual common law remedies, viz: by an action of debt or assumpsit. It is believed, he adds, that by-laws have invariably fixed the exact sum; but, nevertheless, it would seem that a fine of 5*l.*, with power to the mayor or other officer to reduce it to any sum not exceeding a specified amount, would be good.[2] In this country, the practice, if not general, is at least not uncommon, to prescribe limits to fines, and allow them to be imposed within those limits, at the discretion of the magistrate or court intrusted with jurisdiction to hear complaints for breaches of municipal ordinances.

§ 272. *Implied Power to Annex Pecuniary Penalties.*—Since an ordinance or by-law without a penalty would be nugatory,[3] municipal corporations have an implied power to provide for their enforcement by reasonable and proper fines against those

[1] 5 & 6 Will. IV. Chap. LXXVI. Sec. 90. *Ante*, p. 51, and note.

[2] Rawlinson on Corp. (5th ed.) 165, 166, note. *Infra*, Sec. 275.

[3] State *v.* Cleveland, 3 Rh. Is. 117. But no penalty can be enforced for an illegal exaction: Mayor *v.* Avenue Railroad Company, 33 N. Y. 42; 32 *ib.* 261. "Municipal fine," as used in the constitution of California, means a fine imposed by local laws of particular places, such as incorporated towns and cities, and not a fine imposed by the general laws of the state: People *v.* Johnson, 30 Cal. 98, 1866.

who break them.[1] So the right to make by-laws gives to the corporation, without any express grant of power, the incidental right to enforce them by reasonable pecuniary penalties. What is reasonable depends upon the nature of the offence and the circumstances.[2]

§ 273. *Charter Mode Governs.*— Where the charter or organic act prescribes the *manner* in which by-laws are to be enforced, or the sanctions or *punishments* to be annexed to their violation, this constructively operates to negative the right of the corporation to proceed in any other manner, or to inflict any other punishment. Thus, in the leading case[3] on this subject, the charter prescribed in what manner by-laws should be enforced, namely, by *fine* and *amerciament*, or either, and it was decided that the corporation was precluded from declaring a *forfeiture* of property, or from inflicting any other punishment, and the doctrine of this case has been everywhere followed in the courts of this country.

[1] Fisher *v.* Harrisburg, 2 Grant (Pa.) Cas. 291, 1854; Barter *v.* Commonwealth, 3 Pa. (Pen. & W.) 253. The amount must be reasonable: Zylstra *v.* Charleston, 1 Bay (South Car.), 382. The penalty, says Mr. Willcock, must be imposed on the person who violates the by-law. Thus, if goods be sold by an unauthorized person within the city, the penalty must be imposed on the seller, and not on the buyer, for how can he distinguish between those authorized to sell and those who are not: Willc. on Corp. 154, pl. 369, 370; Cadden *v.* Estwick, 1 Salk. 143, 192; S. C. 6 Mod. 124; and see, also, Fazakerley *v.* Wiltshire, 1 Stra. 469. The rule stated above, as to the person on whom penalties must be imposed, may be extended or enlarged by express provisions of the organic act of the corporation.

[2] Mayor, &c. of Mobile *v.* Yuille, 3 Ala. 137, 1841. A penalty, although small, fixed on every stroke of the hammer which an unauthorized person uses in his trade of a goldsmith, is unreasonable: Willc. 154, pl. 368. Same principle: Mayor, &c. of New York *v.* Ordrenan, 12 Johns. 122, 1815.

[3] Kirk *v.* Nowill, 1 Term R. 118, 124, 1786, *per Mansfield* and *Buller*; followed in Hart *v.* Mayor, &c. 9 Wend. 571, 588, 606, 1832; Cotter *v.* Doty, 5 Ohio, 394, 1832; Heise *v.* Town Council, 6 Rich. (South Car.) Law, 404, 1853; Miles *v.* Chamberlain, 17 Wis. 446, 1863. In Hart *v.* Mayor, *supra*, it was accordingly decided that a corporation having authority "to inflict penalties for the violation of any by-law, not exceeding $25 for any one offence," could not pass a by-law subjecting property to *seizure* and *sale*, or *forfeiting* it, even though it was used contrary to the by-law which was in other respects valid, the remedy for enforcing their by-laws having been specified: 9 Wend. 571. *Infra*, Sec. 282.

Where *specific modes* of procedure and penalties are prescribed against

§ 274. A charter of a city specifically enumerated various powers which the council was expressly authorized to enforce by a penalty not exceeding one hundred dollars for their violation; and the same charter empowered the council to prevent and remove encroachments upon the streets, but was silent as to the imposition of penalties for a violation of its provisions. The council passed an ordinance imposing a continuing penalty of ten dollars a day for every day's failure to remove an encroachment, after notice; and it was held, and properly so, that it possessed no power to impose such a penalty, but the decision was put upon the ground that the specific enumeration of the powers which might be rendered effectual by penal provisions *was an implied exclusion* of the right to impose any penalties whatever in other cases.[1]

§ 275. *Penalty may be Within Fixed Limits.*— A municipal corporation, with power to pass by-laws and to affix penalties, may, if not prohibited by the charter, or if the penalty is not fixed by the charter, make it *discretionary, within fixed limits*, for example, "not exceeding fifty dollars." This enables the tribunal to adjust the penalty to the circumstances of the particular case, and is just and reasonable. The older English

persons failing to take out license for keeping drinking houses, as fines, suits, and prosecutions, a municipal corporation, in the absence of express grant, has no right to close the doors of a drinking house *summarily*, because the keeper has failed to take out a license: Bolte *v.* New Orleans, 10 La. An. 321, 1855. That a municipal corporation *cannot annex other or greater penalties* than those authorized in its organic act; that power to punish by "fine" is exclusive, and that it is not competent to ordain a forfeiture in addition, see Schroder *v.* City Council, 2 Const. Rep. (South Car.) 726; S. C. 3 Brev. 533, 1815; McMullen *v.* City Council, 1 Bay (South Car.), 46; Zylstra *v.* Charleston, *ib.* 382; New Orleans *v.* Costello, 14 La. An. 37; Columbia *v.* Hunt, 5 Rich. 550, 558; Kennedy *v.* Sowden, 1 McMul. (South Car.) 328; compare Crosby *v.* Warren, 1 Rich. Law, 385. An ordinance treated as wholly void because it fixed the minimum fine for an offence at five dollars when the law required it to be three dollars: Petersburg *v.* Metzker, 21 Ill. 205, 1859.

[1] Grand Rapids *v.* Hughes, 15 Mich. 54, 1866. Whether there is such an implied exclusion must depend in each case upon the supposed intention of the legislature, to be gathered from a survey of the whole charter. The authority to adopt an ordinance implies the right to enforce it by proper pecuniary penalties, and this right exists unless excluded by other provisions of the charter.

authorities, so far as they hold such a by-law void for uncertainty, are regarded as not sound in principle, and ought not to be followed.[1]

§ 276. *Single Offence Cannot be Made Double.*— As the power to pass ordinances and to punish for their violation must be reasonably exercised, the corporation cannot multiply *one offence* into many, and punish for each. Thus, where an authorized ordinance prohibited "any person from cutting down and making use of cedar and other trees," within a specified locality, a complaint, charging the defendant "with having cut down a cedar tree at various times, and that he continued to do so, from time to time, until he had committed one hundred violations of the ordinance, by cutting down one hundred cedar trees," was held to set forth but a *single* offence, for, said the court, "the matter charged is a trespass with a *continuando*, which, in law, is but one offence, and it may well be that every tree cut by the defendant was cut on *one* day, and, under the ordinance, the cutting of more trees than one, at *one time*, would be but one offence."[2]

§ 277. Where there is a limitation upon the corporation as to the *amount* of penalties to be imposed for the infraction of by-laws, they cannot exceed the limit directly, nor can they do so indirectly by multiplying what is, in substance, one offence, into several, or subdividing one transaction or violation into a number of offences, and annexing a penalty to each.[3] But where

[1] Mayor, &c. *v.* Phelps, 27 Ala. 55, 1855, overruling, on this point, Mayor, &c. *v.* Yuille, 3 *ib.* 137; compare, Commissioners *v.* Harris, 7 Jones (Law), 281. See, also, Piper *v.* Chappell, 14 Mees. & W. 623, 649, 1845; Butchers Co. *v.* Bullock, 3 B. & Pul. 434; Grant on Corp. 84. A by-law fixing one penalty for the first offence and a larger for the second, and a still larger one for every subsequent offence, does not appear to be bad for uncertainty: Butchers Co. *v.* Bullock, *supra*. Where the penalty is fixed by by-law, it can only be changed by the same authority which affixed it: Rex *v.* Ashwell, 12 East, 29; Scarning *v.* Conger, 3 Leon. 7; Moore, 75; Bendl. 159; Davis *v.* Lowden, Carth. 29. A penalty fixed either by the charter or by-law is essential: Bowman *v.* St. John, 47 Ill. 337; Ashton *v.* Ellsworth, 48 Ill. 299. *Supra*, Secs. 271, 272.

[2] State *v.* Moultrieville, Rich. (South Car.) Law, 158, 1839.

[3] Mayor, &c. of New York *v.* Ordrenan, 12 Johns. 122, 1815 (penalty for illegally keeping powder), citing and approving opinion of Lord Mansfield

each offence is distinct, and the punishment for each is within the power of the corporation to impose, the punishment is not made illegal, though the separate fines in the aggregate exceed the limit allowed by the charter, and are imposed by the same magistrate or tribunal at one sitting.[1]

§ 278. By its charter, the power of a city corporation to impose fines for breaches of its ordinances was *limited* to one hundred dollars. By the charter the city had also the power to regulate the inspection of flour, and passed an ordinance by which any person selling flour without inspection should be fined "five dollars for each barrel so sold." It was held that this ordinance, as to the penalty, was valid so far as to authorize a fine not exceeding one hundred dollars; that if a single sale exceeded twenty barrels the fine could be but one hundred dollars, while, if it was less than twenty barrels, the fine would be five dollars on each barrel. The court observed, that a recovery on a single transaction where more than twenty barrels were sold, would bar any future proceeding for the balance.[2]

§ 279. *Power of Forfeiture must be Expressly Conferred.*— A corporation under a general power to make by-laws cannot make a by-law ordaining a *forfeiture of property*. To warrant the exercise of such an extraordinary authority by a local and limited jurisdiction, the rule is reasonably adopted that such authority must be *expressly* conferred by the legislature.[3] And

in Crups *v.* Darden, Cowp. 640. See, also, Hart *v.* Mayor, &c. 9 Wend. 571, 588, 606, 1832; Zylstra *v.* Charleston, 1 Bay (South Car.), 382, 1794; *vide* Stokes *v.* Corporation of New York, 14 Wend. 87.

[1] Heise *v.* Town Council, 6 Rich. (South Car.) Law, 404 (fines for violating liquor ordinance); compare, State *v.* Town Council of Moultrieville, *supra.*

[2] Chicago *v.* Quimby, 38 Ill. 274, 1865.

[3] Kirk *v.* Nowill, 1 Term R. 118, 124, *per Mansfield* and *Buller*, followed by Court of Errors of New York, in Hart *v.* Mayor, &c. of Albany, 9 Wend. 571, 588, *per Sutherland*, J.; p. 605, *per Edmonds*, Senator; 2 Kyd on Corp. 110; Willcock on Municipal Corporations, 180, pl. 449; Angell & Ames on Corp. Sec. 360; Cotter *v.* Doty, 5 Ohio, 394, 1832; White *v.* Tallman, 2 Dutch. (N. J.) 67, 1856; Phillips *v.* Allen, 41 Pa. St. 481. In further illustration, see Mayor, &c. *v.* Ordrenan, 12 Johns. 122; Phillips *v.* Allen, 41 Pa. St. 481; Dunham *v.* Rochester, 5 Cowen, 462, 1826; Baxter *v.* Commonwealth,

even if the power to declare a forfeiture is conferred, still no person can, by ordinance, be deprived of his property by forfeiture without notice or without legal investigation or adjudication; an ordinance in violation of this principle is void, as "contrary to the genius of our laws and institutions."[1] In England the power of municipal corporations to impose a forfeiture for offences created by ordinances or by-laws, has been, in many cases, sanctioned by *usage*, without any express power in the charter to impose the forfeiture. But in this country, inasmuch as corporations derive all their power from charter or act of the legislature, the right to inflict a forfeiture must be plainly given, and cannot be derived from usage.[2]

§ 280. *Power to Fine does not include Power to Forfeit.*—How strictly the courts hold that municipal corporations cannot pass by-laws ordaining a *forfeiture* is strikingly illustrated by the case of Heise *v.* The Town Council of Columbia. The town council had power to enforce obedience to their ordinances "*by fine*, not exceeding fifty dollars." Special authority was given to municipal corporations to grant licenses to retail liquor. The council passed an ordinance relating to this subject, the penalty for violating which was a "fine of not more than fifty dollars for each offence, and also a *forfeiture of the license.*" It was held that the license which was granted and paid for was, essentially, *property;* that the council could only impose *fines*, and that it had no power to ordain a forfeiture of the license, there being (in the opinion of the court) no difference between the forfeiture of a license and of goods and chattels.[3]

§ 281. *Judicial Procedure Necessary in some Instances.*— An ordinance of the city of New Orleans authorizing, without any prior judicial proceedings, a sale, under the orders of the

3 Pa. (Pen. & W.) 253; Bergen *v.* Clarkson, 1 Halst. (N. J.) 352; Taylor *v.* Carondelet (forfeiture of lease), 22 Mo. 105, 112; Mayor, &c. of Mobile *v.* Yuille, 3 Ala. 137, 1841.

[1] Cotter *v.* Doty, 5 Ohio, 394, 398; Rosebaugh *v.* Saffin, 10 Ohio, 32, 1840.

[2] Taylor *v.* Carondelet, 22 Mo. 105, 112; Kirk *v.* Nowill, 1 Term R. 118; Adley *v.* Reves, 1 Maule & Sel. 60.

[3] Heise *v.* Town Council, &c. 6 Rich. (South Car.) Law, 404, 1853.

mayor, of all property suffered to remain on the levee beyond a specified period, is invalid, since it makes the corporation judges and parties in the same cause, and enforces a forfeiture and divests the owner of his property without a trial in due course of law. Such a power is not similar to that exercised by a corporation in removing nuisances, as that power arises from necessity and ceases with that necessity. It would be competent for the corporation to ordain that the property should be removed at the expense of the proprietor, and to recover these expenses and any fine which might be imposed by judicial proceedings.[1]

§ 282. *Forfeiture of Animals at Large.*— The right to denounce a forfeiture against animals running at large in a town or city contrary to the provisions of ordinances forbidding it, must be plainly conferred or it will not be held to exist. This is in accordance with the rule of the English courts, that a statute will not be taken to invest, by implication, a municipal corporation with the extraordinary powers of forfeiting the property of the subject, and that, if it be intended that any such power shall be given, it must be by express words to that effect. The cases agree in holding that when the power to denounce a forfeiture against such animals is given, there should be either notice, actual or constructive, or prior legal proceedings. The view of the courts will be best understood by referring to some of the cases upon the subject. In Mississippi, an ordinance authorizing the seizure and sale of hogs running at large, without notice or trial, or opportunity for trial, and providing that one-half of the proceeds of the sales should go to the hospital and the other half to the city mar-

[1] Lanfear *v.* Mayor, 4 La. 97, 1831. Compare with Guillotte *v.* New Orleans, 12 La. An. 432, 1857, in which it was held that an ordinance providing a forfeiture, for the use of the city workhouse, of bread illegally baked in violation of an authorized by-law of the corporation, is not contrary to a constitutional provision declaring that vested rights shall not be divested unless for purposes of public utility and for adequate compensation previously made. It may be observed, that the court, without any special discussion, assumed that power "to regulate everything which relates to bakers" gave authority to denounce a forfeiture of bread baked contrary to the provisions of the ordinance of the city: See, on this point, Mayor, &c. of Mobile *v.* Yuille, 3 Ala. 137, 1841.

shal, was held to be in violation of the constitutional provision that no person "can be deprived of his property but by due course of law," and securing right to a jury trial.[1]

§ 283. In a similar case in Ohio, *Grimke*, J., delivering the opinion of the court, observes: "The ordinance commands the marshal to seize and impound the hogs, and then, without any reserve, *without any notice*, by means of which the owner might be able to exculpate himself, directs them to be sold and the proceeds placed in the city treasury. Such an ordinance is as contrary to the spirit of the charter (Cincinnati) as it is alien from the general genius of our institutions."[2]

§ 284. In North Carolina the general principle was declared that an ordinance of an incorporated town which authorizes the property of one man to be taken from him and given to another, without any *notice* to the owner or trial of his rights, was unlawful. The town authorities, under power given to make ordinances for the removal of nuisances and for the good government of the town, passed an ordinance to this effect: "That every hog at large in the said town shall be taken up and penned, and advertised to be sold on the third day, and unless the owner should pay the charges (specified in the ordinance) for taking up and keeping such hog, and a sale is effected, the money arising therefrom, after paying the charges, shall be paid over to the *owner* of the said hog." The validity of this ordinance was drawn in question, and two points were ruled by the Supreme Court: 1. That the ordinance was reasonable, and the corporation, under the power above referred to, had authority to pass it. 2. That it suffi-

[1] Donovan *v.* Vicksburg, 29 Miss. (7 Cush.) 247, 1855. Power to impose penalties on the owners of animals running at large excludes, by implication, the power to enforce a by-law upon the subject in any other way, as, for example, by a sale of the animals found at large: Miles *v.* Chamberlain, 17 Wis. 446, 1863. *Supra*, Secs. 272, 273.

[2] Rosebaugh *v.* Saffin, 10 Ohio, 32, 37, 1840. However it may be when the power to forfeit without notice or prior legal proceedings is *explicitly conferred*, it is clear that the power, unless plainly and expressly given, cannot be exercised without such notice and previous adjudication; but with these the remedy may, if needful, be "prompt and strong:" Cincinnati *v.* Buckingham, 10 Ohio, 257, 262, *per Lane*, C. J.

ciently provided for notice to the owner by the impounding of the animal and the three days public advertisement, and that personal notice was not necessary.[1] In a subsequent case in the same court a similar ordinance was sustained. It was objected that it was invalid, because it provided for no judicial decision condemning the property to be sold. This objection the court regarded as insufficient, "since the owner may, if he chooses, have a full investigation of the case by bringing an action of replevin, as in any other case of distress."[2]

§ 285. In South Carolina it has been held, that under authority to enforce by-laws by *fine*, an ordinance, otherwise legal, which authorized the marshal to kill hogs running at large, contrary to the ordinance, and appropriate them to his own use, was void.[3]

§ 286. *Equity will not Ordinarily Relieve against Valid Forfeitures.*— A forfeiture imposed by a municipal corporation,

[1] Shaw *v.* Kennedy (North Car.), Term R. 158, 1817; Helen *v.* Noe, 3 Ire. (Law) 493, 1843.

[2] Whitfield *v.* Longest, 6 Ire. (Law) 268, 1846. In Iowa a similar ordinance was sustained: Gooselink *v.* Campbell, 4 Iowa, 296, 1856; *Contra*, Willis *v.* Legris, 45 Ill. 289, 1867; Bullock *v.* Geomble, *ib.* 218; Poppen *v.* Holmes, 44 Ill. 360. But see Hart *v.* Mayor, &c. of Albany, 9 Wend. 571, 1832; White *v.* Tallman, 2 Dutch. (N. J.) 67, 1856; Philips *v.* Allen, 41 Pa. St. 481. Power must be strictly pursued or the sale will be void, and the officer a trespasser: Clark *v.* Lewis, 35 Ill. 417. Sale is void where two animals, belonging to different owners, are sold at once: *Ib.* *Ante*, Sec. 101.

[3] McRae *v.* O'Lain, cited Kennedy *v.* Sowden, 1 McMullen (South Car.), Law, 328. But authority to impose "*fines and penalties*" authorizes a fine against those who violate the ordinance forbidding hogs running at large, and the seizure, impounding, and sale (upon notice) of the animals to pay the fine, whether they belong to residents or non-residents: Kennedy *v.* Sowden, *supra*; S. P. Crosby *v.* Warren, 1 Rich. (South Car.) Law, 385, 1845, *Wardlaw*, J., dissenting; McKee *v.* McKee, 8 B. Mon. 433, 1848. But it seems doubtful, upon the principles adopted in the construction of powers of this character, whether authority to impose fines and penalties extends any further than to the imposition of *pecuniary fines and penalties:* See Mayor of Mobile *v.* Yuille, 3 Ala. 137; White *v.* Tallman, 2 Dutch. (N. J.) 67, 1856. The power to forfeit, like the power to tax, should be given either expressly, or, at all events, by *necessary* implication. And it has been held, that it cannot be implied from the power "to impose reasonable fines," and to cause "all such fines and all such forfeitures and penalties as may be incurred under the laws and ordinances of the corporation to be assessed, levied, and collected:" Cotter *v.* Doty, 5 Ohio, 395, 1832.

under legislative authority, for a violation of a valid by-law, and inflicted as a penalty for such violation, cannot be relieved against in equity, unless, perhaps, where peculiar circumstances furnish grounds for equitable interposition, the general doctrine being that equity may relieve against forfeitures declared by contract, but not against those expressly declared or authorized by statute.[1]

§ 287. *Power to Enforce by Imprisonment must be Expressly Given.*— In this country it is not unusual to provide, in the organic act of municipal corporations, that, if fines for violations of by-laws or ordinances are not paid, the offender may be committed to prison for a limited period. And, in respect to some offences public in their character, the power to imprison in the first instance is often conferred.[2] It is scarcely necessary to add, that unless the authority be plainly given it does not exist, and when given, before it can be exercised there must be a judicial ascertainment by a competent tribunal or magistrate of the guilt of the party.[3]

On Whom Ordinances are Binding, and Who must Notice them.

§ 288. *Who Bound.*— In *England* the by-laws of a municipal corporation bind not only the members, but, if they are general in their nature and purposes, and not limited to any

[1] Taylor *v.* Carondelet, 22 Mo. 105 (forfeiture clause in lease); Peachy *v.* Somerset, 1 Str. 447; Gorman *v.* Low, 2 Edw. Ch. 324; Keating *v.* Sparrow, 1 Ball & Beat. 367; State *v.* Railroad Company, 3 How. (U. S.) 534.

[2] Barter *v.* Commonwealth, 3 Pa. (Pen. & W.) 253, 1831; New Orleans *v.* Costello, 14 La. An. 37; Burlington *v.* Kellar, 18 Iowa, 59; London *v.* Wood, 12 Mod. 686; Bab *v.* Clerke, Moore, 411; Clarke's Case, 5 Co. 64; 1 Roll. Abr. 364; Com. Dig. By-Law E, 1; Chilton *v.* Railway Company, 16 M. & W. 212; King *v.* Merchant Tailors' Company, 2 Lev. 200.

[3] *Ex parte* Burnett, 30 Ala. 461, 1857. Fines for the violation of ordinances, held under special charter provisions, collectible by commitment of the person or by *fieri facias:* Huddleson *v.* Ruffin, 6 Ohio St. 604. Authority to enforce penalties for violations of ordinances by "*distress and sale*" of property must be expressly or plainly granted: White *v.* Tallman, 2 Dutch. (N. J.) 67, 1856; Bergen *v.* Clarkson, 1 Halst. (N. J.) 67. And in England, likewise, such a power cannot be conferred by the crown, and can only exist by authority of parliament or a special custom: Clerke *v.* Tucker, 3 Lev. 281; S. C. 2 Vent. 183; Lee *v.* Walis, 1 Keny. Cas. 295; Sayer, 263; Adley *v.* Reeves, 2 Maule & Sel. 60; Willc. 179; Glover, 311.

particular class or description, but intended to extend to all persons coming within the local jurisdiction of the corporation, they bind all, whether members or strangers, and all must take notice of them at their peril. And by-laws made by a municipal corporation with respect to a liberty or franchise granted them, with local jurisdiction beyond the limits of the municipality, are as binding upon persons going into the liberty as the by-laws of the city upon those who come within its walls.[1]

§ 289. So, also, *in this country* it is settled that valid ordinances bind not only the inhabitants of the corporation, but also strangers or non-residents coming within its limits. These, for the time being, are regarded as inhabitants, and liable in the same manner for violations of ordinances.[2] So far is plain. But suppose a person living without the limits of the corporation suffers his cattle or property to stray into it and violate its ordinances. Here two questions may arise: 1st. Can such property, being *within* the corporation, be dealt with the same as if it belonged to an inhabitant of the corporation? It is held that it can.[3] 2d. Can such *non-resident* owner be made amenable *personally* to a penalty to the corporation? In other words, has a corporation power, unless expressly conferred, to provide for collecting a penalty from a non-resident who suf-

[1] Willc. 105, 107; Glover, 289, 290; London *v.* Vanacker, 1 Ld. Raym. 498; Salk. 142; Pierce *v.* Bartram, Cowp. 270; Fazakerley *v.* Weltshire, 1 Stra. 462; Kirk *v.* Nowill, 1 Term R. 118; Butcher Co. *v.* Mercy, 1 H. Bl. 370. Do not bind beyond limits of authorized jurisdiction: See 3 Mod. 158; T. Jones, 144; 2 Brownl. 177; Hob. 211; Hutt. 6; 11 Rep. 53; Godb. 252. An ordinance passed in 1834, prohibiting the erection of "stables, &c. in the interior of the city of New Orleans, or any of its incorporated suburbs," held not to extend to the city of Lafayette, subsequently added, by act of the legislature, to the city of New Orleans: New Orleans *v.* Anderson, 9 La. An. 323, 1854.

[2] Heland *v.* Lowell, 3 Allen, 407, 1862; Whitfield *v.* Longest, 6 Ire. (Law) 268, 1846; approving, Pierce *v.* Bartram, Cowp. 269. See, also, Buffalo *v.* Webster, 10 Wend. 99; Commissioners of Wilmington *v.* Roby, 8 Ire. (Law) 250; Commissioners of Plymouth *v.* Pettijohn, 4 Dev. (Law) 591; Strauss *v.* Pontiac, 40 Ill. 301, 1866; City Council *v.* Pepper, 1 Rich. (S. Car.) Law, 364, 1845; City Council *v.* King, 4 McCord (S. Car.), 487; Marietta *v.* Fearing, 4 Ohio, 427, 1831; Dodge *v.* Gridley, 10 Ohio, 173; Horney *v.* Sloan, 1 Smith (Ind.), 136; Kennedy *v.* Sowden, 1 McMullen, 323.

[3] Whitfield *v.* Longest, 6 Iredell (Law), 268, 1846; Gosselink *v.* Campbell, 4 Iowa, 296, 300, 1856; Reed *v.* People, 1 Park. Cr. Rep. 481.

fers his property to violate an ordinance, but who himself was, at the time, without the corporate limits? This remains, perhaps, to be settled, though it is certain that ordinances will not be construed to extend to persons living without the corporation and not being within it, unless such an intention plainly appears.[1]

§ 290. *Notice.* — All persons upon whom ordinances are binding are bound to take notice of them.[2] But where a party is liable to a penalty if he does not do a given act upon notice, a newspaper notice is not sufficient, unless that mode is pointed out by the law, or general power is given to the corporation, embracing within it the authority to prescribe the kind and manner of notice.[3]

Ordinances Relating to the Licensing, Regulation, and Taxing of Amusements and Occupations, Including the Sale of Intoxicating Liquors.

§ 291. *Nature of License Power.* — Charters not unfrequently confer upon the corporation the power "to license and regulate," or to "license, regulate, and tax," certain avocations

[1] Plymouth *v.* Pettijohn, 4 Dev. (Law) 591. Inability to punish non-resident owner criminally in respect to property within corporate limits, see Reed *v.* People, 1 Park. Cr. Rep. 481. Power "to make such prudential rules and regulations as may seem necessary for the better improving of the *common lands* of a town," &c. extends only to regulations as between those who have the right to enjoy them in common, but does not confer the power of imposing a penalty for *trespasses by strangers;* for such acts the town must pursue its common law remedy: Foster *v.* Rhoads, 19 Johns. (N. Y.) 191, 1821. See, also, People *v.* Works, 7 Wend. 486; Holladay *v.* Marsh, 3 Wend. 142. Ordinances cannot have an *extra territorial* effect, unless the power be plainly conferred upon the corporation: Strauss *v.* Pontiac (liquor ordinance), 40 Ill. 301, 1866; Gosselink *v.* Campbell, 4 Iowa, 296. Whether a party *resides within the limits* embraced by an ordinance, is a question of fact: Board *v.* Pooley, 11 La. An. 743; Police Jury *v.* Villaviabo, 12 *ib.* 788; New Orleans *v.* Boudu, 14 *ib.* 303.

[2] Palmyra *v.* Morton (sidewalk ordinance), 25 Mo. 593, 1860; Buffalo *v.* Webster, 10 Wend. 99, 1833. See Reed *v.* People, 1 Park. Cr. Rep. 481; City of London *v.* Vanacre, 12 Mod. 270, 272; Glover on Corp. 207, 290. *Post,* Chap. XIX.

[3] Keckely *v.* Commissioners of Roads, 4 McCord (S. Car.), 257, 1828.

and employments, and to "tax and restrain" or "prohibit" exhibitions, shows, places of amusement, and the like; and unless there is some specific limitation on the authority of the legislature in this respect, such provisions are constitutional.[1] Concerning useful trades and employments, a distinction is to be observed between the power to "license" and the power to "tax." In such cases the former right, unless such appears to have been the legislative intent, does not give the authority to prohibit, or to use the license as a mode of taxation, with a view to revenue, but a reasonable fee for the license and the labor attending its issue may be charged. Respecting amusements, exhibitions, &c., the authority of the corporation under the power to license has been regarded as greater than when

[1] City *v.* Clutch, 6 Iowa, 546, 1858. In Mayor, &c. of Mobile *v.* Yuille, 3 Ala. 137, 1841, it was determined that there was nothing in the constitution of the state which would invalidate a grant of power to a municipal corporation "to *license bakers*, and *regulate the weight and price of bread*, and to prohibit the baking, for sale, except by those licensed." Such a grant of power does not unlawfully interfere with the right of citizens to pursue their lawful occupations. In the City of Boston *v.* Schaffer, 9 Pick. 415, 1830, it was decided that it is competent for the legislature to grant a city or town power to require the payment of money as the condition of exercising particular employments, *e. g.* giving theatrical or other exhibitions. This is not in the nature of a *tax*, which must be general, but of an excise on special vocations. Approved, Cincinnati *v.* Bryson, 15 Ohio, 625; New Orleans *v.* Turpin (auctioneers), 13 La. An. 56, 1858; Municipality *v.* Dubois (livery stable keeper), 10 *ib.* 56; Charity Hospital *v.* Stickney, 2 La. An. 550; Slaughter *v.* Commonwealth, 13 Gratt. (Va.) 967; Carrol *v.* Mayor, &c. 12 Ala. 173; Merriam *v.* New Orleans, 14 La. An. 318; Wynne *v.* Wright, 1 Dev. & B. (N. Car.) Law, 19; The Mayor, &c. *v.* Hartridge, 8 Geo. 23; Cincinnati *v.* Bryson, 15 Ohio, 625, dissenting opinion of *Burchard*, J.; Collins *v.* Louisville, 3 B. Mon. (Ky.) 133; The Germania *v.* State, 7 Md. 1; The State *v.* Roberts, 11 Gill & Johns. (Md.) 506; Sears *v.* West, 1 Murph. (N. Car.) 291; People *v.* Thurber, 13 Ill. 557; Savannah *v.* Charlton, 36 Geo. 460, 1867. See chapter on Taxation, *post*.

These cases show some diversity of opinion as to the right to *tax particular employments* as distinguished from property, but the correct view, it is submitted, is this: Unless specially restrained by the constitution, the legislature may provide for the taxing of any occupation or trade; and may confer this power upon municipal corporations. But such taxes are apt to be inequitable and the principle not free from danger of great abuse. Hence ordinances of this character ought not to be sustained, unless the authority be expressly or otherwise unequivocally conferred.

the same word is employed as to trades and occupations.[1] Words of this character, however, do not always have exactly the same meaning, and the intention of the legislature in using them must often be gathered from the whole charter and the general legislation of the state respecting the subject matter.

§ 292. In harmony with the foregoing principles, it has been held that, under authority "to license and regulate" draymen, &c., a municipal corporation may, by ordinance, require a license to be first taken out, and charge a reasonable sum for issuing the same and keeping the necessary record, but cannot, by virtue of this authority, without more, levy a tax upon the occupation itself; and, under the power to *regulate*, it may make proper police regulations as to the *mode* in which the employment shall be exercised.[2]

[1] Ash *v.* People, 11 Mich. 347; *ante*, p. 125, Sec. 79; Freeholders *v.* Barber, 2 Halst. 64; Carroll *v.* Tuscaloosa, 12 Ala. (N. S.) 173; Greensboro *v.* Mullins, 13 *ib.* 341; State *v.* Roberts, 11 Gill & Johns. 506; City Council *v.* Ahrens, 4 Strob. 241; Kip *v.* Patterson, 2 Dutch. 298; Portland *v.* O'Neill, 1 Ire. 218; Bennett *v.* Birmingham, 31 Pa. St. 15; Commonwealth *v.* Stodder, 2 Cush. 562; Day *v.* Green, 4 Cush. 433; Dunham *v.* Rochester, 5 Cow. 462; Lawrenceburg *v.* West, 16 Ind. 337; Cheney *v.* Shelbyville, 18 Ind. 84; Bennett *v.* People, 30 Ill. 389; East St. Louis *v.* Wehrung, 46 Ill.; Savannah *v.* Charlton, 36 Geo. 460. *Post*, Chap. XIX.

Distinction between *taxation* and *police regulation* well stated by *Depue*, J., in State *v.* Hoboken, 33 N. J. Law, 280, 1869. See, also, Kip *v.* Patterson, 2 Dutch. (N. J.) 298; Mayor *v.* Avenue Railroad Company, 32 N. Y. 261; 33 *ib.* 42, distinguished and questioned in Frankford Railway Company *v.* Philadelphia, 58 Pa. St. 119, 1868; Johnson *v.* Philadelphia, 60 Pa. St. 445; Freeholders *v.* Barber, 2 Halst. (N. J.) 64. Difference between tax and a license to exercise particular callings upon making pecuniary compensation for the privilege: People *v.* Thurber, 13 Ill. 557; Mount Carmel *v.* Wabash Co. 50 Ill. 69. Smith *v.* City of Madison, 7 Ind. 86, 1855, so far as it holds that authority "to suppress and restrain" bowling saloons confers the power to license and *tax* them, cannot, as it seems to us, be sustained. Mayor, &c. *v.* Beasley, 1 Humph. (Tenn.) 240, holds that power in a charter to *regulate* and *restrain* tippling houses did not confer the power to tax them.

[2] Cincinnati *v.* Bryson, 15 Ohio, 625, 1846. As to correctness of application of the principle of law to the facts, *quære*. Consult, in connection with the above case, Mays *v.* Cincinnati, 1 Ohio St. 268, 1853; with which compare, Cincinnati *v.* Buckingham, 10 Ohio, 261; and see cases cited *supra*, Sec. 291. An act to regulate and license the keeping of *dogs*, was regarded as an exercise of the police, and not the taxing power of the state, and not to be within the constitutional provision requiring *uniformity* of taxation:

§ 293. So authority to a city to adopt rules and orders "for the due regulation of omnibuses, stages, &c.," was held not to authorize the adoption of an ordinance requiring the payment of a tax, or duty, on each carriage licensed, varying from one to twenty dollars, according to the different kinds of carriages, and the stands occupied. This was regarded as a direct tax upon the vehicle used, or its owner, and not necessary to secure the objects of the above grant of power to the city.[1] So where under an act authorizing the trustees of a

Carter *v.* Dow, 16 Wis. 298, 1862; Tenney *v.* Lenz, *ib.* 566. In the case last cited, *Paine*, J., observes: "We cannot assent to the position that, if the sum required for a license exceeds the expense of issuing it, the act transcends the licensing power, and imposes a tax. By such a theory the police power would be shorn of all efficiency. * * * We have no doubt, therefore, that the legislature may, in regulating any matter that is a proper subject of the police power, impose such sums for licenses as will operate as partial restrictions upon the business, or upon the keeping of the particular kinds of property regulated." See, also, Fire Department *v.* Helfenstein, 16 Iowa, 123, 1870. *Post*, Chap. XIX.

In Ash *v.* People, 11 Mich. 347, 1863, it appeared that, by its charter, authority was given to a city to erect, establish, and regulate markets and market places, and to *license* and regulate butchers and shop-keepers at any *other* place in the city, for the sale of meats, &c. and to authorize the mayor to grant such licenses and to prescribe the *sum* of money to be paid into the treasury of the city therefor. An ordinance prohibiting the keeping of meat shops outside of the public markets without a license, and requiring the payment of a license fee of five dollars, was sustained, although the amount exceeded the expense of making and registering the license. The court denied that the fee demanded was a *tax*, and regarded it as but a reasonable compensation for the additional expense of municipal supervision over the business at the place licensed. A ferry license fee of fifty dollars was held not to be a *tax*, within the meaning of the term, as used in the constitution of Michigan and the charter of the city of Detroit: Chilvers *v.* People, 11 Mich. 43, 1862; *ante*, p. 125, Sec. 79. "The power to license and regulate carries with it the right to require the payment of a [reasonable] sum in consideration of the license:" *Per Wright*, J., in State *v.* Herod, 29 Wis. 136. *Ante*, p. 135, Sec. 93.

[1] Commonwealth *v.* Stodder, 2 Cush. 562, 572, 1848; distinguished from Boston *v.* Schaffer, 9 Pick. 415, as to licences for theatrical exhibitions. Power to the city council of Charleston to make, *inter alia*, "such ordinances respecting streets, carriages, wagons, carts, drays, &c. as to them shall seem expedient and necessary," was held to authorize an ordinance requiring all persons who drive for hire any cart, dray, wagon, or omnibus, within the city, to take out a license, and to require the vehicle to be numbered, or on failure to do so to pay a fine: City Council *v.* Pepper, 1 Rich. (South Car.) Law, 364, 1845. A similar ordinance, and imposing annual

village corporation to make ordinances "in relation to hucksters, and for the good government of the village," it was held that an ordinance was unauthorized which required that hucksters should, before exercising their employment, take a license, and be taxed a sum varying from five to thirty dollars.[1]

§ 294. On the other hand the power to "license, regulate, and restrain amusements," it was admitted or taken for granted would authorize an ordinance taxing, or requiring exhibitors to pay a specific sum for the privilege, this being considered as a means of regulating and restraining them.[2] So a grant of power to a city or town to license exhibitions "on such terms and conditions as to it may seem just and reasonable," authorizes it to exact *money* for the license; it is not confined to regulating time and place, establishing police regulations, &c.[3]

§ 295. *Right must be plainly Conferred.* — Even the right to license must be plainly conferred, or it will not be held to exist. Thus, power to make "by-laws *relative to* hucksters, grocers, and victualling shops," does not authorize the corporation to exact a *license* from persons carrying on such business. Nor does the general power to pass prudential by-laws, not in-

charge on each car of a street railway company, was sustained as a police regulation: Frankford Railway Company *v.* Philadelphia, 58 Pa. St. 119, 1868; S. P. Johnson *v.* Philadelphia, 60 Pa. St. 445: *Contra,* Mayor *v.* Avenue Railroad Company, 32 N. Y. 261. Power to license, tax, and regulate horse railroads, hackney carriages, &c. does not extend to taxation of *private vehicles* used by a merchant or manufacturer: St. Louis *v.* Grove, 46 Mo. 574, 1870.

[1] Dunham *v.* Rochester, 5 Cowen, 462, 466, 1826. See further, index, Markets.

[2] Hodges *v.* Mayor, 2 Humph. (Tenn.) 61. See also, Carter *v.* Dow, 16 Wis. 299; Tenny *v.* Lenz, *ib.* 567. Speaking of this subject, Mr. Justice *Cooley* expresses it as his opinion that, where the right to impose license fees to operate as a restriction upon the business or thing licensed can be fairly deduced from the taxing power conferred upon the corporation, it should be done, rather than to derive the right solely from the power to regulate: Const. Lim. 202. note.

[3] Boston *v.* Schaffer, 9 Pick. 415, 1830; distinguished from Commonwealth *v.* Stodder, 2 Cush. 562, 572, 1848.

consistent with the laws of the state, confer the authority to demand a license.[1]

§ 296. *Monopolies invalid.* — The power to license and regulate a lawful and necessary business will not give the corporation the power to make contracts which create, or tend to create, a monopoly.[2]

[1] Dunham *v.* Rochester, 5 Cow. 462, 1826; Commonwealth *v.* Stodder, 2 Cush. 562, 1848; Mays *v.* Cincinnati, 1 Ohio St. 268, 1853. By-laws requiring a *license*, which may be so heavy as to amount to a prohibition, were justly considered to be in restraint of trade, which the general law favors, and in this case were adjudged void, "both for want of jurisdiction" in the corporation to pass them, and for want of "conformity to the general law:" *Ib.* 2 Cow. 466. Where the charter gave the corporation the power "to *license* bakers, and to prohibit sales of bread except by those licensed," the court doubted whether under this, aside from the taxing power of the corporation, an ordinance could be supported which required twenty dollars to be paid by the baker for a license, although it admitted that the corporation could require a fee for issuing and registering the license: Mayor, &c. of Mobile *v.* Yuille, 3 Ala. 137, 1841. Statutory conditions precedent must be complied with to make a license valid; and licenses are generally considered personal, ceasing with the life of the licensee, and not transferable without consent: Munsell *v.* Temple (grocery license), 3 Gilm. (Ill.) 96; Lewis *v.* United States, Morris (Iowa), 199: Lombard *v.* Cheever (ferry license), *Ib.* 473; Brunette *v.* Mayor, 9 La. 430. As to power to *revoke* licenses: Towns *v.* Tallahasse, 11 Flor. 130, 1866. "Junk Shops," defined by *O'Neall*, C. J. "to be a place where odds and ends are purchased or sold," and cities are often empowered to exact a license from keepers thereof: City Council *v.* Goldsmith, 12 Rich. (South Car.) Law, 470, 1860. *Shows* defined: McKee *v.* Town Council, Rice (South Car.) Law, 24. *Licensed auctioneer* held not liable to the payment of a pawnbroker's license, under a city ordinance: Hunt *v.* Philadelphia, 35 Pa. St. 277.

[2] Chicago *v.* Rumpff, 45 Ill. 90, 1867. In this case, under a power granted to city, in its charter, to regulate and license the slaughtering of animals within the corporate limits, the common council passed an ordinance, whereby a particular building was designated for the slaughtering of all animals intended for sale or consumption in the city, the owners of which were granted the *exclusive right*, for a specified period, to have all such animals slaughtered at their establishment, they to be paid a specific sum for the privilege by all persons exercising it, and to have the option of accepting such proposition, but which was not to take effect until they executed a certain bond therein required; and it was held that this action of the corporate authorities could not be regarded as regulating or licensing the business, but was simply a conditional proposition, which, if accepted, would constitute a contract. It was also held that this contract tended to create a monopoly, and was therefore void. And the opinion was expressed

§ 297. *Intoxicating liquors.* — The authority of municipalities to license, tax, restrain, or prohibit the traffic in, or sale of, *intoxicating liquors*, is so differently conferred, and so largely influenced by the general legislation and policy of the state on the subject, that the decisions relating to it are mostly of local application. Sometimes the state laws are manifestly intended to repeal or modify prior special charter provisions, which gave the control of the matter to the local authorities;[1] and at other times incorporated places have, by the course of legislation, been excepted from the general operation of the state laws, and have been allowed to license, regulate, or prohibit the traffic, as they deemed best.[2]

§ 298. Where there are general laws of the state respecting the sale of intoxicating liquors, a public corporation, by virtue of a general power "to make all *by-laws* that may be necessary to preserve the peace, good order, and internal police" therein, is not authorized to pass an ordinance requiring a cor-

that under the charter, authority was conferred simply to pass ordinances to locate and construct, and to regulate, license, restrain, abate, or prohibit, slaughtering establishments within the prescribed limits; and to that end the corporate authorities may so regulate the business as to prohibit its exercise, except in a particular place; but the spot so designated must be open to the enjoyment of all persons alike, upon the same terms and conditions. A monopoly cannot be *implied*, but must rest upon express grant: Canal Company *v.* Railroad Company, 11 Leigh, (Va.) 42, *per Tucker*, President *Post*, Chap XVIII. as to gas companies.

[1] State *v.* Harris, 10 Iowa, 441; Burlington *v.* Kellar, 18 Iowa, 59; Hammond *v.* Haines, 25 Md. 541.

[2] Perdue *v.* Ellis, 18 Geo. 586; Trustees *v.* Keeting, 4 Denio, 341. Construction of charters in connection with state laws on the subject: Town Council *v.* Harbers, 6 Rich. (South Car.) Law, 96; *ib.* 404; State *v.* Eastabrook, 6 Ala. 653; West *v.* Greenville, 39 Ala. 69; Adams *v.* Mayor, 29 Geo 56; Chaslain *v.* Town Council, 29 Geo. 333; Cuthbert *v.* Conley, 32 Geo. 211 State *v.* Garlock, 14 Iowa, 444; Harris *v.* Intendant, &c. 28 Ala. 577; Robinson *v.* Mayor, &c. 1 Humph. 156; Pekin *v.* Smelzel, 21 Ill. 464; State *v.* Plunkett, 3 Harr. (N. J.) 5; both held consistent and able to stand together: Byers *v.* Olney, 16 Ill. 35: Page *v.* State, 11 Ala. 849; Benefield *v.* Hines, 13 La. An. 420; Louisville *v.* McKean, 18 B. Mon. 9. Liquor license fee held not a *tax*, in the constitutional sense of the term, compelling uniformity of taxation: East St Louis *v.* Wehrung, 46 Ill. 392. Special provision of charter construed not to give power to *prohibit absolutely* the sale of liquor in the town: Hill *v.* Decatur, 22 Geo. 203.

porate license, and punishing persons who sell such liquors without being thus licensed.[1]

§ 299. In the absence, however, of controlling general legislation, power to a city to pass "in general, every other by-law or regulation that shall *appear to the city council* requisite and necessary for the security, welfare, and conveniency of the city, or for preserving the peace, order, and good government within the same," was held to authorize an ordinance (and the same is constitutional) to prevent shopkeepers, unless licensed by the city, from keeping spirituous liquors in their shops, or in any adjacent room.[2]

A corporation whose charter contained the general welfare clause, and also specific power "to license persons to retail spirituous liquors, and to prohibit persons from selling without such license," and was, it seems, silent as to the amount which might be demanded for a license, was adjudged competent to enact an ordinance demanding $500 as the fee for a retail license.[3]

[1] Commonwealth *v.* Turner, 1 Cush. 493, 1848. The limitations on such a general power to make by-laws, discussed by *Shaw*, C. J. As to text, see Commonwealth *v.* Dow, 10 Met. 382, 1845. General welfare clause does not authorize a municipal corporation to pass an ordinance prohibiting the retail of intoxicating liquors, when this is repugnant to the state laws on the subject: *Ex parte* Burnett, 30 Ala. 461, 1857. But under a different state of general legislation, see State *v.* Clark, 8 Foster (N. H.), 176, 1854; Heisembrittle *v.* City of Charleston, 2 McMullen (South Car.), 233; State *v.* Ferguson, 22 N. H. 424, 1851; distinguished from and commenting on the above cases: State *v.* Freeman, 38 N. H. 426, approving and following, State *v.* Clark, 8 Fost. 176; Megowan *v.* Commonwealth, 2 Met. (Ky.) 3, 1859.

[2] Heisembrittle *v.* City Council, 2 McMullen (South Car.), Law, 233, 1842. Followed and affirmed: City Council *v.* Ahrens, 4 Strob. (South Car.) Law, 241, 1850. See City Council *v.* Baptist Church (giving preamble to charter in question), *ib.* 306, 308. A town had exclusive authority over the sale of liquors therein, and it was held that power to "regulate, restrain, and suppress shops and places for the sale of ardent spirits by retail," amounted to an authority to forbid the sale; for if there is a sale it must be made in some shop or place: Clintonville *v.* Keeting, 4 Denio, 341, 1847; Thomas *v.* Mt. Vernon, 9 Ohio, 290. Construction of charter provisions, holding that the sale of intoxicating liquors might be declared a nuisance by the municipal authorities: Block *v.* Jacksonville, 36 Ill. 301; Goddard *v.* Same, 15 *ib.* 588; Byers *v.* Trustees, &c. 16 *ib.* 35; Pekin *v.* Smelzel, 21 *ib.* 464.

[3] Perdue *v.* Ellis, 19 Geo. 586, 1855. But see *Ex parte* Burnett, 30 Ala. 461, and compare that with Intendant *v.* Chandler, 6 Ala. 899. See also St. Louis

Power by its charter to a city "*to tax*, or entirely suppress, all petty groceries," was held, in connexion with other provisions of the charter expressly authorizing certain other subjects to be licensed, not to confer upon the corporation the power to grant licenses for retailing vinous liquors, and to demand a sum of money therefor.[1]

Ordinances Relating to Public Offences.

§ 300. *Distinction Between Laws and By-Laws — Concurrent Prohibitions, &c.*— Statute law and by-laws are intended to meet different wants and exigencies, and to serve different purposes. The former, when general in its nature and operation, is intended to furnish a rule for the government of the people of the state everywhere. The latter, made by the corporation under derivative authority, are local regulations for the government of the inhabitants of the incorporated place; and of course they must be void unless specially authorized by the charter or organic act of the corporation, when they are repugnant to, or inconsistent with, the general law of the land. No implied power to pass by-laws, and no express general grant of the power, can authorize a by-law which conflicts either with the national or state constitution, or with the statute of the state, or with the general principles of the common law adopted or in force in the state.

§ 301. The laws of the state operate within the limits of municipal corporations and upon their inhabitants the same as elsewhere, unless it is otherwise clearly provided in the charter, or by some statute of the state; and unless so provided, in case of conflict between *laws* and *by-laws*, the latter must give way. But the state may, and as to local matters frequently

v. Smith, 2 Mo. 113; where there was charter power to "restrain and prohibit tippling houses," and the corporation was held entitled to impose a license fee. Power to "tax" and "restrain" sale of liquor includes power to grant licenses: Mt. Carmel *v.* Wabash county, 50 Ill. 69, 1869.

[1] Leonard *v.* Canton, 35 Miss. (6 Geo.) 189, 1858. Power "to prohibit tippling houses," does not authorize an ordinance prohibiting sales of beer by brewers: Strauss *v.* Pontiac, 40 Ill. 301, 1866. Prohibition in ordinance to sell liquors without license, held not to apply to sales by manufacturers, but to retail dealers: St. Paul *v.* Troyer, 3 Minn. 291.

does, except municipal corporations from the operation of its laws, and either provides a special law for them or authorizes them to provide special regulations for themselves; and when this is done there is no conflict. But these local laws and regulations are at all times subject to the paramount authority of the legislature. Questions of difficulty have arisen in consequence of grants of power to municipal corporations to make ordinances respecting matters and acts already regulated by general statute, and if criminal in their nature, punishable under the laws of the state. Hence, the same act comes to be forbidden by general statute, and by the ordinance of a municipal corporation, each providing a separate and different punishment. The same transaction may, if complex in its nature, be in one part of it an offence against the general law, and in another against the by-law, but such cases present no difficulty. But can the same act be twice punished, once under the ordinance and once under the statute? The cases on this subject cannot be reconciled. Some hold that the same act may be a double offence, one against the state and one against the corporation. Others regard the same act as constituting a single offence, and hold that it can be punished but once, and may be thus punished by whichever party first acquires jurisdiction.

§ 302. In view of the somewhat strict construction of grants of corporate powers, elsewhere explained and illustrated, and of the subordinate nature and purposes of by-laws, the following rules, although seeming to rest on sound principles, are, in view of the decisions, stated with some distrust of their entire correctness: I. A general grant of power, such as mere authority to make by-laws, or authority to make by-laws for the good government of the place, and the like, should not be held to confer authority upon the corporation to make an ordinance punishing an act — for example, an assault and battery, which is made punishable as a criminal offence by the laws of the state. The intention of the state that the general laws shall not extend to the inhabitants of municipal corporations, or that these corporations shall have the power, by ordinance, to supersede the state law, will not be inferred from

grants of power general in their character; nor will such authority in the corporation be held to exist as an implied or incidental right. II. Where the act is, in its nature, one which constitutes two offences, one against the state and one against the municipal government, the latter may be constitutionally authorized to punish it, though it be also an offence under the state law: but the legislative intention that this may be done should be manifest and unmistakable, or the power in the corporation should be held not to exist. III. Where the act or matter, covered by the charter or ordinance, and by the state law, is not, essentially, criminal in its nature, and is one which is generally confided to the supervision and control of the local government of cities and towns, but is also of a nature to require general legislation, the intention that the municipal government should have power to make new, further, and more definite regulations, and enforce them by appropriate penalties, will be inferred from language which would not be sufficient were the matter one not specially relating to corporate duties, and fully provided for by the general laws. Such are the general principles to be extracted from the authorities, but the exact state of the law will more satisfactorily appear, and, indeed, can only be seen by reference to the adjudicated cases; accordingly, the leading ones upon the subject are stated in the note,[1] and in some of its aspects the matter is further considered in the chapter on Municipal Courts.

[1] *Ex parte* Smith, Hempstead, 201, 1832; Mayor, &c. of Savannah *v.* Hussey, 21 Geo. 80, 1857; New Orleans *v.* Miller, 7 La. An. 651, 1852; Municipality *v.* Wilson, 5 *ib.* 747; State *v.* Cowan, 29 Mo. 330 (furious driving); St. Louis *v.* Cafferata, 24 Mo. 94 (Sunday ordinances); Amboy *v.* Sleeper, 31 Ill. 499; State *v.* Ledford, 3 Mo. 102; Independence *v.* Moore, 32 Mo. 392; McLaughlin *v.* Stevens, 2 Cranch C. C. R. 148; St. Louis *v.* Bentz, 11 Mo. 61 (ordinance against vagrants); United States *v.* Holly, 3 Cranch C. C. R. 656; Jefferson City *v.* Courtmire, 9 Mo. 683 (ordinance against riots); Davis *v.* State, 4 Stew. & Port. (Ala.), 83; State *v.* Plunkett, 3 Harrison (N. J.), 5, 1840; Rice *v.* State, 3 Kansas, 141, 1865; Rogers *v.* Jones, 1 Wend. 261; Mayor, &c. of New York *v.* Hyatt, 3 E. D. Smith, 156; Borough of York *v.* Forscht, 23 Pa. St. 391; March *v.* Commonwealth, 12 B. Mon. 25; Commissioners *v.* Harris, 7 Jones (Law), 281; Brooklyn *v.* Toynbee, 31 Barb. 282; Davenport *v.* Bird, 32 Iowa (not yet reported), Dec. Term, 1871; Zylstra *v.* Charleston, 2 Bay (South Car.), 382; Petersburg *v.* Metzker, 21 Ill. 205, 1859; Barter *v.* Commonwealth, 3 Pa. 253; State *v.* Clark, 1 Dutch. (N. J.) 54; State *v.* Pollard, 6 Rh. Is. 290; People *v.* Jackson, 8 Mich. 110.

Ordinances Relating to the Public Health, Safety, and Convenience.

§ 303. *Health Ordinances— Hospitals and Burials.*— Our municipal corporations are usually invested with power to preserve the health and safety of the inhabitants. This is, indeed,

Treating of the *constitutional* question involved, Mr. Justice *Cooley* remarks, that although the decisions are not uniform, the clear weight of authority is, "that the same act may constitute an offence both against the state and the municipal corporation, and both may punish it without violation of any constitutional principle:" Const. Lim. 199; S. P. March *v.* Commonwealth, 12 B. Mon. 25, 29, *per Simpson*, C. J. In *England* a by-law imposing a penalty on a corporator, for refusing to serve in a *corporate* office, is valid, notwithstanding the party may be indicted for the same refusal, as he may be in all cases of municipal offices necessary or proper to carry on the government of the corporation: Grant on Corp. 82. A distinction was there early made between grave offences classified as *pleas* of the crown and triable upon an issue of not guilty between the king and the defendant, and lesser or petty offences punishable by fine or amerciament upon *presentment* in court leet, or inferior jurisdictions: See Hale, P. C. Vol. I. Chap. LII.; Vol. II. Chap. XIX.; Norton's Com. London, 370, 453.

In *Georgia* the general welfare clause in a charter was decided not to authorize the passage of an ordinance prescribing a different mode of trial and punishment *in addition* to that provided for by the general criminal code of the state, for harboring and enticing seamen: Savannah *v.* Hussey, 21 Geo. 80, 1857. The power of municipal corporations to legislate respecting offences fully covered by the state law is denied, and the general subject is largely and satisfactorily discussed, and it is well remarked that, in such cases, "the law of the state is the law of the corporation; and they cannot make another law for themselves." The following is extracted from the opinion delivered by a very able judge: "Under the general grant of power (to pass all such ordinances as may seem necessary for the security, welfare, &c., of the city) the city authorities may cover all [proper] cases not provided for by the paramount authorities of the state. All those ordinances regulating cemeteries, commons, markets, vehicles, fires, exhibitions, lamps, licenses, water works, watch, police, city taxes, city officers, health, nuisances, &c., are legitimate and proper. Nay, I might go further, and concede that where a state law defines an offence generally, and prescribes a punishment without reference to the place where it is committed, in town or country, and the act, when committed in the streets and public places of the city, would be attended with circumstances of aggravation, such as an affray, for instance, the corporate authorities, with a view to suppress this special mischief, might probably provide against it by ordinance. But this is going quite far enough." But I deny that "a municipal corporation can legislate *criminaliter* upon a case fully covered by the state law, though aware that decisions may be found to support" that view: *Per Lumpkin*, J., in Savannah *v.* Hussey, 21 Geo. 80, 86, 1857. And it is settled in Georgia, that where an act amounts to an indictable offence it can-

one of the chief purposes of local government, and reasonable by-laws in relation thereto have always been sustained in England as within the incidental authority of corporations to

not be punished under municipal ordinances, but the offender must be bound over to the proper court; if it does not amount to an indictable offence the offender may be punished under the ordinances of the municipality, and if it is a nuisance, steps may also be taken to have it abated: Vason *v.* Augusta, 38 Geo. 542, 1868.

But in *Alabama* it is held that a municipal corporation, with power to enact ordinances "for the *good government* of the place, not contravening the laws of the state," may pass an ordinance imposing a fine for an assault and battery within its limits, and a punishment under the state law for the same act is no bar to a prosecution under the ordinance. *Collier*, C. J., delivering the opinion of the court, says: "The object of the power conferred by the charter, and the purpose of the ordinance itself, was not to punish an offence against the criminal justice of the country, but to provide a mere *police regulation* for the enforcement of good order and quiet within the limits of the corporation. * * The offences against the corporation and the state are distinguishable and wholly disconnected, and the prosecution at the suit of each proceeds upon a different hypothesis — the one contemplates the observance of the peace and good order of the city; the other has a more enlarged object in view — the maintenance of the peace and dignity of the state:" Mayor, &c. of Mobile *v.* Allaire, 14 Ala. 400, 1848. If the principle stated in the text be correct, the soundness of this decision under the powers conferred on the corporation may admit of doubt, but the same view had been previously taken in the same court in The Mayor, &c. of Mobile *v.* Rouse (liquor law), 8 Ala. 515, 1845. And see Moore *v.* State, 16 Ala. 411; Greensboro *v.* Mullins, 13 Ala. 341. Extent of police power: Shafer *v.* Mumma, 17 Md. 331. *Ante*, Secs. 93, 95, 291, 292.

Authority to pass ordinances "to preserve the health and comfort of the town," does not empower the corporation to pass an ordinance to prevent or punish breaches of the peace: Raleigh *v.* Dougherty, 3 Humph. (Tenn.) 11, 1842. See chapter on Municipal Courts, *post.* Where gambling and the keeping of *gambling houses* are made public offences by state laws, offenders may be prosecuted in the state courts for the violation of these laws, notwithstanding the organic acts of cities may give to the city council power "to restrain, prohibit, and suppress games and gambling houses." In thus holding, the court adds: "It is not necessary, in this case, to decide whether both the state and the city can punish for the same act; but we have no doubt that the one which shall first obtain jurisdiction of the person of the accused may punish to the extent of its power:" Rice *v.* State 3 Kansas, 141, 1865. Gambling being punishable under the general law, a city council "invested with authority to make ordinances to secure the inhabitants against fire, against violations of the law and the public peace, to *suppress* riots, *gambling*, drunkenness, indecent and disorderly conduct, to punish lewd behavior in public places, * * and, generally, to provide for the safety, prosperity, and good order of the city," possesses, by virtue

ordain. It will be useful to illustrate the subject by reference to some of the adjudged cases.[1] An ordinance of a city prohibiting, under a penalty, any person, not duly licensed therefor by the city authorities, from "removing or carrying

thereof, no power to make the keeping of any gambling device a misdemeanor, and to punish the same: Mount Pleasant *v.* Breeze, 11 Iowa, 399, 1860.

In *Missouri* it is held that where the same act (as, for example, furious driving in highways and public places) is a violation of a valid municipal ordinance and of the general criminal statutes of the state, the offender can be punished but once, and hence, to an indictment in the state court, he may plead a former conviction under the ordinance of the municipal corporation: State *v.* Cowan, 29 Mo. 330, 1860. But *quære*. The opinion in this case assumes, without discussion, that the offence is single: *Ib.*

In Slaughter *v.* People, 2 Doug. (Mich.) 334, the principle was decided that it was not competent to punish, under a city ordinance, an act which was indictable. Illustrating the difference between prosecutions under special penal provisions of a city charter, of acts with specified fines and penalties affixed by the charter, but which acts are breaches of the law of the state, wherever committed, and ordinary prosecutions under municipal ordinances, see Wayne County *v.* Detroit, 17 Mich. 390, 1868; People *v.* Detroit, 18 Mich. 445, 1869; People *v.* Jackson, 8 Mich. 110. *Post*, Chap. XIII.

In *Indiana* it was first held, that where the act complained of is indictable as a criminal offence against the laws of the state, a person could not be punished for such act under or by virtue of the ordinances of a city: City Council of Indianapolis *v.* Blythe, 2 Ind. (Carter) 75, 1850. In this case the city, unsuccessfully, sought to recover a penalty prescribed by ordinance for an assault and battery committed by the defendant within the city: Same principle, City of Madison *v.* Hatcher, 8 Blackf. 341, 1846. But these cases were overruled by Ambrose *v.* State, 6 Ind. 351, in which it was held that a single act might constitute two offences, one against the state and one against the municipal government, and "that each might punish in its own mode, by its own officers, the same act as an offense against each:" *Perkins*, J., in Waldo *v.* Wallace, 12 Ind. 582, 1859, where prior cases in that state are referred to. See, also, Lawrenceburg *v.* West, 16 Ind. 337; Fox *v.* State, 5 How. 410; Moore *v.* People, 14 How. 13.

In *Louisiana*, municipal corporations are held to have no power to impose a penalty on that which is made punishable as a criminal offence by the laws of the state. But it is admitted that there is a class of offences against public order not made punishable by the state law, which it is within the power of such corporation to suppress: New Orleans *v.* Miller, 7 La. An. 651, 1852; Municipality *v.* Wilson, 5 *ib.* 747. This case seems to concede that the city corporation cannot punish for an act identical with that punished by the state law. See, also, Commissioners *v.* Harris, 7 Jones (Law), 281; People *v.* Jackson, 8 Mich. 110.

[1] *Ante*, Chap. VI. p. 137, Sec. 95.

through any of the streets of the city any house dirt, refuse, offal, or filth," is not improperly in restraint of trade, and is reasonable and valid. Such a by-law is not in the nature of a monopoly, but is founded upon a wise regard for the public health. It was contended that the city could regulate the number and kind of horses and carts to be employed by strangers or unlicensed persons as well as they could those of licensed persons. But *practically* it was considered that the main object of the city could be better accomplished by employing men over whom they have entire control, night and day, who are at hand, and able from habit to do the work in the best way and at the proper time.[1]

§ 304. Authority by charter to pass ordinances respecting the harbors and wharves, and "every other by-law necessary for the security, welfare, and convenience of the city," gives to the city council power to pass a health ordinance, requiring boats coming from infected places to anchor before landing, and to submit to an examination, provided such ordinance be not repugnant to the general law of the state. And it was further held, that a general law of the state prohibiting "any person coming into the state from an infected place, and in violation of quarantine regulations," was not repugnant to and did not render the ordinance invalid.[2]

[1] Vandine, petitioner, 6 Pick. 187, 1828; commented on in Commonwealth *v.* Stodder, 2 Cush. 562, 575, 576, 1848. In Zylstra *v.* Corporation of Charleston, 1 Bay (South Car.), 382, 1794, Mr. Justice *Waties* (one of the most accomplished of early American judges), speaking of an ordinance prohibiting the making of soap or candles contrary to the mode prescribed and within the limits of the city, says: "I am willing to admit that the by-law itself is a valid one. If it restrained an *inoffensive* trade it would not be so; but it is made to restrain one that is both offensive and dangerous. It is, therefore, calculated to guard the comfort and safety of the citizens; *and the benefit of a by-law is, generally, the touch-stone of its validity.*"

Power to a city council to compel the owners and occupants of *slaughter-houses* to cleanse and abate them whenever necessary for the health of the inhabitants, was considered not to authorize an ordinance entirely prohibiting the slaughtering of animals within certain limits of the city: Wrexford *v.* People, 14 Mich. 41, 1865; see Metropolitan Board of Health, 37 N. Y. 661; Shrader, *Ex parte*, 33 Cal. 279, 1867. Powers with respect to *privies:* Gregory *v.* Railroad Company, 40 N. Y. 273.

[2] Dubois *v.* Augusta, Dudley (Geo.), 30, 1831. *Ante*, p. 137.

§ 305. *Hospitals.*— Authority to the corporation of New Orleans "to pass such by-laws as they shall deem necessary to maintain the cleanliness and salubrity of the city," was considered, in view of its extensive nature, certain provisions of the civil code, and the liability of the city to epidemics, as conferring power upon the city council to prohibit the erection and maintenance of *private hospitals;* the court admitting that the same question had been decided otherwise by tribunals governed by the common law jurisprudence.[1]

[1] Milne *v.* Davidson, 5 Martin (La.), 410, 1827.

As to *city* hospitals, see Vionet *v.* Municipality, 4 La. An. 42; Bozant *v.* Campbell, 9 Rob. (La.) 411; City Council *v.* Boyd, 1 Const. Rep. A. D. 1817 (South Car.), 352; Tucker *v.* Virginia City, 4 Nev. 20. Municipal corporation may found hospitals for the poor under 39 Eliz. Chap. V. *In re* Newcastle, 12 Clark & Fin. 402.

Quarantine ordinances of a municipal corporation, passed by virtue of a grant of power from the state, whereby passenger vessels are required to remain in quarantine for a specified period, are not repugnant to the commercial clause of the federal constitution: St. Louis *v.* McCoy, 18 Mo. 238, 1853; S. P. St. Louis *v.* Boffinger, 19 *ib.* 13; Metcalf *v.* St. Louis, 11 *ib.* 103. In modern usage, *quarantine* is not confined to vessels having on board the plague, but extends to vessels having on board other contagious diseases: *Per Tenney*, C. J., Mitchell *v.* Rockland, 41 Maine, 363, 1856; S. C. again, 45 Maine, 496, 1858. *Ante*, p. 137, Sec. 95.

Boards of Health.—An ordinance creating and giving to the board of health "general supervision over the health of the city," and "all necessary power to carry the ordinance into effect," was considered to include the power to rent a building for a temporary hospital, to protect the city from an apprehended visitation of the cholera, and to make the corporation liable for the rent, although it did not become necessary to use the house: Aull *v.* Lexington, 18 Mo. 401, 1853. *Power of board of health* to bind corporation: Frend *v.* Dennett, 4 C. B. (N. S.) 576; Barton *v.* New Orleans, 16 La. An. 317; Belcher *v.* Farrar, 8 Allen, 325; Hazen *v.* Strong, 2 Vt. 427; Commissioners *v.* Powe, 6 Jones (Law), 134; Wilkinson *v.* Albany, 8 Fost. 9. Regularly, the *orders* of a board of health, directing the abatement of a nuisance, should be *in writing*. Such orders may be proved by the minutes of the board, by the written orders themselves or by being recited in the proceedings of the corporation of which the board of health are members. How far *parol evidence* may be received of such orders, when it appears that no record or written evidence ever existed, is not free from doubt: Meeker *v.* Van Rensselaer, 15 Wend. 397, 1836, where parol evidence of this kind was held inadmissible by the Supreme Court. But see, in Court of Errors, Van Wormer *v.* Mayor, 18 Wend. 169; affirming S. C. 15 Wend. 263. See, also, People *v.* Adams, 9 Wend. 333; 6 *ib.* 651. *Ante*, Chap. XI.

§ 306. *Cemeteries and Burials.*— The public health, comfort, and convenience are concerned in the proper regulation of *burials;* and the evils resulting from its neglect are especially to be apprehended in the crowded populations of cities. Power to regulate this matter may properly be conferred upon municipal corporations. And such power will be held to be given by authority to make police regulations or to pass by-laws respecting the health, good government, and welfare of the place.[1] Power to city corporation, after enumerating various objects, "*in general* to pass every *other* by-law that to it shall seem requisite and necessary for the security, welfare, and convenience of the city," &c., was, by the Court of Appeals of South Carolina, considered to give authority to regulate the burial of the dead, and particularly to prevent the establishment of new burial grounds within the limits of the city, and, in the opinion of the organ of the court, also to regulate the time of burial, the manner of interment so as to prevent noxious effluvia, and to prohibit interments in the private gardens, yards, and by-places of the city.[2] But as every by-law must be reasonable, an arbitrary and unnecessary or oppressive restraint upon the right of burying the dead is invalid.[3]

[1] Bogert *v.* Indianapolis, 13 Ind. 134, 1859, *per Perkins*, J.; Mayor, &c. of New York *v.* Slack, 3 Wheel. Cr. Cas. 237, 1824; Presbyterian Church *v.* Mayor, &c. of New York, 5 Cow. 538, 1826; Coates *v.* Same, 7 Cow. 582, 1827; Austin *v.* Murray, 16 Pick. 121, 1834; Commonwealth *v.* Fahey, 5 Cush. 408, 1850; New Orleans *v.* St. Louis Church, 11 La. An. 244, 1856; distinguished from Presbyterian Church *v.* Mayor, &c. of New York, *supra;* Commonwealth *v.* Goodrich, 13 Allen, 546.

[2] City Council *v.* Baptist Church, 4 Strob. (South Car.) Law, 306, 309, 1850, *per Frost*, J.; S. P. Bogert *v.* Indianapolis, 13 Ind. 134, *per Perkins*, J.; New Orleans *v.* St. Louis Church, 11 La. An. 244; distinguished from 5 Cowen, 538, *supra;* Musgrove *v.* Catholic Church, 10 La. An. 431.

[3] Austin *v.* Murray, 16 Pick. 121, 1834; Coates *v.* Mayor, &c. of New York, 7 Cow. 585; Commonwealth *v.* Fahey, 5 Cush. 408, 1850.

The *law of burials*, in some of its relations to property and municipal rights, was ably considered by the Hon. Samuel B. Ruggles, referee, in the matter of the opening of *Beekman* street, in New York City, whose report establishing the following principles was confirmed by the Supreme Court: 1. In this country, corpses and their burials are not matters of ecclesiastical cognizance. 2. That the right to bury a corpse and preserve its remains is a legal right, belonging, in the absence of testamentary disposition, exclu-

§ 307. Where the burden to support a public *cemetery* is required to be borne by all the citizens, an ordinance throwing that burden upon a particular class is unreasonable and void.[1] Cemeteries in cities are not *per se* nuisances, but special circumstances may make them so. It is not, however, sufficient that they affect the market value of property in the vicinity.[2] A city corporation had power, by charter, "to establish cemeteries or burial places within or without the city." It was held that this would authorize the city to establish cemeteries of its own, and regulate them; but that it did not empower the council to subject to the control of the city sexton cemeteries other than those belonging to the city, nor to pass an ordinance prohibiting lot owners in private cemeteries, though within the city limits, from entering to bury without the permission of the city sexton, to be obtained only by paying him the price of digging a grave.[3]

§ 308. *Nuisances, and of the Power to Prevent and Abate.*— It is to secure and promote the public health, safety, and convenience, that municipal corporations are so generally and so liberally endowed with power to prevent and abate nuisances. This authority may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the legal notion of a nuisance, but such power, conferred in general terms, cannot be taken to authorize the extra-judicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not such.[4]

sively to the next of kin, and includes the right to select and change the place of sepulture at pleasure. 3. If place of burial is taken for public use the next of kin may claim indemnity for expense of removing and suitably re-interring their remains: Matter of Beekman street, 4 Bradf. (N. Y.) 503, 532, 1856; Bogert *v.* City of Indianapolis, 13 Ind. 134, 1859, *per Perkins*, J. See, also, Matter of Brick Church, 3 Edw. Ch. Rep. (N. Y.) 155.

[1] Beurojohn *v.* Mayor, &c. 27 Ala. 58, 1855.

[2] New Orleans *v.* St. Louis Church, 11 La. An. 244, 1856; Musgrove *v.* Same, 10 *ib.* 431; Lake View *v.* Letz, 44 Ill. 81, 1867.

[3] Bogert *v.* Indianapolis, 13 Ind. 134, 1859.

[4] Crosby *v.* Warren, 1 Rich. (South Car.) 385; Roberts *v.* Ogle, 30 Ill. 459; Salem *v.* Railroad Company, 98 Mass. 431; Dingley *v.* Boston, 100 Mass. 544; Van Dyke *v.* Cincinnati, 5 Disney, 532; Lake View *v.* Letz, 44 Ill. 81; Wreford *v.* People, 14 Mich. 41, 1865; State *v.* Jersey City, 5 Dutch. (N. J.)

Speaking upon this subject in a very recent case, where a city, under authority to prevent and restrain encroachments on rivers running through it, commenced summary proceeding to remove a private wharf, an eminent judge uses this language: "But the mere declaration by the city council, that a certain structure was an encroachment or obstruction, did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by the mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property in the city, at the uncontrolled will of the temporary local authorities."[1]

170. That which is authorized by legislative authority cannot be declared a nuisance by a city corporation: *Ib.* The power to abate nuisances is a portion of police authority necessarily vested in the corporations of all populous towns: Kennedy *v.* Phelps, 10 La. An. 227, *per Buchanan*, J. May pass ordinances to prevent as well as remove: Gregory *v.* Railroad Company, 40 N. Y. 273. A city held to have no power to destroy a dam across a creek within its limits as a nuisance: Clark *v.* Mayor, &c. of Syracuse, 13 Barb. 32.

[1] *Per Miller*, J., Yates *v.* Milwaukee, 10 Wall. 497, 1870; Underwood *v.* Green, 42 N. Y. 140. A person sick, even with a contagious disease, in his own house or at a hotel is not a nuisance: Boom *v.* Utica, 2 Barb. 104, 1848.

Works that amount to a private nuisance, causing actual damage to private persons, cannot be justified, under a license from the city council, to erect them. But the fact of such license is evidence of great but not conclusive weight in favor of the party erecting and owning the works claimed to be a nuisance: Ryan *v.* Copes, 11 Rich. (South Car.) Law, 217, 1858. A *pig sty* in a populous place is, *per se*, a nuisance: Commissioners *v.* Vansickle, Bright (Pa.) R. 69. *Livery stable* in a town is not, *per se*, a nuisance; it depends upon its location and the manner in which it is built, kept, or used: Aldrich *v.* Howard, 7 Rh. Is. 87; Burditt *v.* Swenson, 17 Texas, 489, 1856; Dargan *v.* Waddell, 9 Ire. (Law) 244; Kirkman *v.* Handy, 11 Humph. (Tenn.) 406; Coker *v.* Birge, 10 Geo. 336. *Brick making:* Wanstead, &c. *v.* Hill, 13 C. B. (N. S.) 479. *Slaughter house:* Dubois *v.* Budlong, 10 Bosw. (N. Y.) 700; 20 N. J. Eq. 415. *Powder house*, with large quantities of powder therein, located in a city, is a nuisance: Cheatham *v.* Shearn, 1 Swan (Tenn.), 213, 216; Durnesnil *v.* Dupont, 18 B. Mon. 800. *Planing mill:* Rhodes *v.* Dunbar, 57 Pa. St. 274. As to *gas works:* Cleveland *v.* Gas Light Co. 20 N. J. Eq. 201. *Stock yards: Ib.* 296; Ashbrook *v.* Commonwealth, 1

§ 309. Power to municipal corporation to make "by-laws relative to *nuisances* generally," has been decided to authorize an ordinance prohibiting the keeping, in any manner whatsoever, of a *bowling alley for gain or hire*, such a place being a public nuisance at common law.[1] So, under power to pass by-laws to prevent and remove nuisances, an ordinance may be

Bush (Ky.), 139. In Louisiana, where the civil code (Art. 655) provides that works, &c., causing annoyance "shall be regulated by the rules of police or the customs of the place" where located, an ordinance of a city council ordering a blacksmith shop to be closed, as a nuisance, is authorized by law, and may be carried into effect by an injunction, procured by the city in its corporate name, restraining the owner from continuing the shop: New Orleans *v.* Lambert, 14 La. An. 247, 1859.

Power of municipal corporation to remove nuisances, and how far their decision as to fact of nuisance is conclusive: Welch *v.* Stowell, 2 Doug. (Mich.) 332; Kennedy *v.* Board of Health, 2 Pa. St. 366; Commissioners *v.* Vansickle, Bright (Pa.), 69; Green *v.* Savannah, 6 Geo. 1; Roberts *v.* Ogle, 30 Ill. 459; Clark *v.* Mayor, &c. 13 Barb. 32; Saltonstall *v.* Banker, 8 Gray, 195; Kennedy *v.* Phelps, 10 La. An. 227; Green *v.* Underwood, 42 N. Y. 140.

[1] Tanner *v.* Albion, 5 Hill (N. Y.), 121, 1843; followed, Updyke *v.* Campbell, 4 E. D. Smith, 570, 1855; The People *v.* Sargeant, 8 Cow. 139, which held that a room kept for the playing of billiards was not a public nuisance, though a profit was made of it, commented on and distinguished, and by *Cowen*, J., doubted in 5 Hill, *supra*. Whether a ball alley could be prohibited under the general authority to pass by-laws relative to good government, &c., was alluded to, but not determined: See Jackson *v.* People, 9 Mich. 111; Smith *v.* Madison, 7 Ind. 86. In the State *v.* Hull, 32 N. J. 158, 1867, it was held that a ten-pin alley kept for gain and public use in a town is not, *per se*, a nuisance. The law on the subject is very fully examined in the opinion of *Beasley*, C. J., and the case of Tanner *v.* Albion, *supra*, reviewed and disapproved. Where a city has, by its charter, the power to determine whether bowling alleys shall be allowed, and, if so, under what restrictions, an ordinance requiring them to be closed at a certain hour is valid: State *v.* Hay, 29 Maine (16 Shep.), 457, 1849; State *v.* Freeman, 38 N. H. 426. Under authority to pass such ordinances as the council "may consider fit and proper to remove nuisances or causes of disease," &c., it was held that the city of Savannah might prohibit the growing of rice within the corporate limits, as being injurious to the health of the city, and abate the same, and that such an ordinance was valid as a police regulation: Green *v.* Savannah, 6 Geo. 1, 1849. Where proceedings in respect to nuisances are instituted by order of the city council, chancery will not enjoin or interfere, "unless the municipal corporation have clearly transcended their powers:" Kennedy *v.* Phelps, 10 La. An. 227, 1855 (building for *curing hides*); S. P. Milne *v.* Davidson (private hospital), 5 Martin (La.), 586, 1827.

passed inflicting a fine on any person who should exhibit a *stud-horse* in the streets of the corporation.[1]

§ 310. Power "to suppress *bawdy houses*," gives the corporation authority, by implication, to adopt, by ordinance, the proper means to accomplish the end; and among the methods which may be adopted, is one forbidding the owners of houses from renting or letting the same for this purpose, or with knowledge that they are to be thus used.[2] But power to the common council of a city "to make all such by-laws as it may deem expedient for effectually preventing and suppressing houses of ill-fame," does not authorize the council to decide that a given house is kept for that purpose, nor if kept for that purpose, does it authorize the council to order it to be demolished; nor if thus demolished, will it justify the officers of the city who did it, in execution of the ordinance and resolution of the council.[3]

§ 311. A city charged by law with the duty of preventing obstructions of a river within its limits, may, by its own act, and without proceeding by indictment, abate or remove anything which obstructs the free and public use of the river, such as a *floating store-house*, calculated to remain stationary in the water, and which exclusively occupies a portion of the

[1] Nolin *v.* Mayor, 4 Yerg. (Tenn.) 163, 1833. Under power "to prevent and remove nuisances," a corporation may, if a vacant building is so used as to endanger by fire the property of others, or the health of the community, declare the same a nuisance and notify owner to abate it, and if he fails, the individual officers of the corporation who abate the nuisance may, on being individually sued, justify the act: Harvey *v.* Dewoody, 18 Ark. 252, 1856.

[2] Childress *v.* Mayor, &c. 3 Sneed (Tenn.), 347, 1855. Power to make by-laws relative to nuisances, gives authority to impose penalties on the keepers of houses of ill-fame, and on persons owning houses used, with their knowledge, for this purpose: McAlister *v.* Clark, 33 Conn. 91, 1865. See Ely *v.* Supervisors, 36 N. Y. 297; Shafer *v.* Mumma, 17 Md. 331, 1861. In prosecutions for keeping bawdy houses, the law, it has been said, so far relaxes the ordinary rule, that common reputation as to the character of the defendants, and of the houses which they keep, is admissible: State *v.* McDowell, Dudley (South Car.), Law, 346.

[3] Welch *v.* Stowell, 2 Doug. (Mich.) 332, 1846.

river, such a structure being a public nuisance.[1] It is no answer to this right of abatement that room enough is left for the public, or that the structure is beneficial;[2] or that the party erecting it is the owner of the adjacent lots.[3]

§ 312. But under the power to abate nuisances, property lawfully erected and existing, or a house which is only a nuisance because occupied by a business which is such, cannot be destroyed or demolished. The public can proceed by indictment, or the business carried on in the house suppressed.[4]

§ 313. *Markets, and of the Power to Establish and Regulate.*— The states, under their police power, may delegate to municipal corporations the authority to establish, or authorize the establishment of, markets; and it is competent to such corporations, under proper grants of power, to enact ordinances forbidding sales and purchases of marketable articles, except at designated market places. The extent of the power possessed by a particular corporation depends upon its charter. In England the regulation of markets by by-laws has long been

[1] Hart *v.* Mayor, &c. of Albany, 9 Wend. 571, 1832; a valuable and very carefully considered case; affirming S. C. 3 Paige Ch. R. 213; People *v.* Vanderbilt, 28 N. Y. 396. See Dutton *v.* Strong, 1 Black, 23. The corporate body may abate or remove the nuisance; but without *express authority* cannot ordain a *forfeiture* of the structure, or seize and *sell it*, or convert the materials to their own use: 9 Wend. 571, 609, *supra.*

[2] *Ib.* Respublica *v.* Caldwell, 1 Dallas, 150; King *v.* Russel, 6 East, 427; King *v.* Cross, 3 Camp. 224; King *v.* Jones, 3 Camp. 229.

[3] Hart *v.* Mayor, &c. 9 Wend. 571, 608; Strange R. 1247; 3 Bac. Abr. 686; 1 Hawk. P. C. 363, note 1.

[4] Clark *v.* Syracuse, 13 Barb. 32; Welch *v.* Stowell, 2 Doug. (Mich.) 332, 1846. When equity will interfere to prevent and remove nuisances which affect the public generally: People *v.* St. Louis. 5 Gilm. (Ill.) 372; Hoole *v.* Attorney-General, 22 Ala. 190: Attorney-General *v.* Gas Company, 19 Eng. Law and Eq. 639; Aldrich *v.* Howard, 7 Rh. Is. 87; Zabriskie *v.* Railroad Company, 2 Beasley Ch. (N. J.) 314; Jersey City *v.* Hudson, *ib.* 420; Dumesnil *v.* Dupont, 18 B. Mon. 800, 1857. A city council may, by resolution, direct its officers to proceed against a specified establishment as a nuisance, and cause the same to be abated under a general ordinance of the corporation; this is a different thing from passing an ordinance inflicting a fine upon a particular person for keeping a nuisance, which cannot be lawfully done: Kennedy *v.* Phelps, 10 La. An. 227, 1855. See Commonwealth *v.* Goodrich, 13 Allen, 545; Municipality *v.* Blineau, 3 *ib.* 688.

exercised, and such by-laws are sustained as being reasonable, and conducive to the health and good government of the municipality.[1] In this country the practice is almost universal on the part of the legislature to confer upon the municipal agencies more or less authority with respect to markets and market places, and such grants are not so strictly construed as those which invest the corporation with powers of a more extraordinary or unusual character — at least such is the case unless a monopoly in favor of private individuals is sought to be sustained, against which the courts strongly lean.[2]

[1] Pierce *v.* Bartram, Cowp. 270; Player *v.* Jenkins, 1 Sid. 284; Rex *v.* Cottrell, 1 B. & Ad. 67, 1817. See, also, Mosley *v.* Walker, 7 Barn. & Cress. 40; Mayor, &c. *v.* Pedley, 4 Barn. & Adol. 397; Grant on Corp. 166, as to exclusive privileges in England as to markets and market tolls. *Definition.* — A market is a franchise or liberty derived from the crown, by grant, or prescription which presupposes a grant: 2 Black. Com. 37. "It is a designated place in a town or city to which all persons can repair who wish to buy or sell articles there exposed for sale:" *Per Breese*, J., Caldwell *v.* Alton, 33 Ill. 416.

"A *municipal market* consists: 1. In a *place* for sale of provisions and articles of daily consumption. 2. Convenient fixtures. 3. A system of police regulations, fixing market hours, making provisions for lighting, watching, cleaning, detecting false weights and unwholesome food, and other arrangements calculated to facilitate the intercourse and insure the honesty of buyer and seller. 4. Proper officers to preserve order and enforce obedience to the rules:" *Per Lane*, C. J., Cincinnati *v.* Buckingham, 10 Ohio, 257, 1840.

[2] Wartman *v.* Philadelphia, 33 Pa. St. 202, 209, 1854; LeClaire *v.* Davenport, 13 Iowa, 210; White *v.* Kent, 11 Ohio St. 550; St. John *v.* Mayor, &c. of New York, 6 Duer, 315; Ash *v.* People, 11 Mich. 347; St. Louis *v.* Jackson, 25 Mo. 37; St. Louis *v.* Weber, 44 Mo. 547, 1869; Nightingale's Case, 11 Pick. 168; Congot *v.* New Orleans, 16 La. An. 21; Buffalo *v.* Webster, 10 Wend. 99; Yates *v.* Milwaukee, 12 Wis. 673; Bethune *v.* Hughes, 7 Geo. 560; Ketchum *v.* Buffalo, 14 N. Y. 356; Municipality *v.* Cutting, 4 La. An. 336; New Orleans *v.* Guillotte, 12 La. An. 818 (corporate partnership with individuals); State *v.* Lieber, 11 Iowa, 407; Dubuque *v.* Miller, 11 Iowa, 583; Municipality *v.* Cutting, 4 La. An. 335; Morano *v.* Mayor, 2 La. 218; St. Paul *v.* Coulter, 12 Minn. 41; Atlanta *v.* White, 33 Geo. 229.

The power to establish and regulate markets, like most other municipal powers, is a *continuing one*, and markets once established may be abandoned or changed at the pleasure of the corporation, and the tax payers or property owners cannot restrain the action or determination of the council entrusted by the charter with the exercise of the power: Gall *v.* Cincinnati, 18 Ohio St. 563, 1869.

§ 314. *Power to Build and Establish.*— Incorporated cities and towns may have the power to build market houses without an *express* grant. Thus it has been held, that a town having authority "to make by-laws for managing and ordering its *prudential* affairs," has power — the court looking somewhat to usage and custom to ascertain what subjects of common interest are embraced under the term, "*prudential*,"— to appropriate money for the erection of a market house, and to raise the amount by taxation. This power, it was admitted, more clearly exists in the case of large towns and populous villages.[1]

§ 315. Power conferred upon a municipalty "to *establish* and regulate markets," authorizes, as a necessary incident, the purchase of ground upon which to erect a market building.[2] If the title to land purchased for the erection of a market house be taken by the municipal corporation in fee, no length of use of the same for a market will *dedicate* it for market purposes; and the markets may be abandoned or changed at the will of the council, and the land thus acquired and held be sold.[3] It is incident to the general power to build a market to determine upon the form, dimensions, and style of the edifice, and therefore to employ an architect to prepare plans, specifications, &c.[4]

[1] Spaulding *v.* Lowell, 23 Pick. 71, 1839. If the real and principal object is the building of a market house, the appropriation of a portion of the building for other purposes, as the holding of courts, does not render the erection of the building illegal. If, however, the building of the market house is merely colorable, that is, done for the purpose of accomplishing distinct and unauthorized objects, it would, says Chief Justice *Shaw*, probably be treated as an abuse of power and a nullity: *Ib.* *Ante*, p. 135.

[2] Ketchum *v.* Buffalo, 14 N. Y. 356; 17 N. Y. 449; Caldwell *v.* Alton, 33 Ill. 416. It is immaterial whether this power is conferred in express or direct terms, or given only as part of the power to make by-laws, ordinances, &c.: *Per Selden*, J., in Ketchum *v.* Buffalo, 14 N. Y. 356, 362. Purchase of land for market: People *v.* Lowber, 28 Barb. 65; S. C. more fully, 7 Abb. Pr. Rep. 158.

[3] Gall *v.* Cincinnati, 18 Ohio St. 563, 1869.

[4] Peterson *v.* Mayor, &c. of New York, 17 N. Y. 449, 1858. His unauthorized employment by a committee is ratified by a resolution of the council passed with notice of the facts, adopting his plans, drawings, &c., and he may recover of the city for the labor and service of preparing them: *Ib.*

§ 316. But power to a municipal corporation to establish markets and build market houses will not give the authority to build them on a *public street.* Such erections are nuisances though made by the corporation, because the street, and the whole street, is for the use of the whole people. They are nuisances when built upon the streets, although sufficient space be left for the passage of vehicles and persons. Such erections may, it seems, be legalized by an express act of the legislature. But unless so legalized, a nuisance erected and maintained by a public corporation may be proceeded against, criminally or otherwise, the same as if erected by private persons.[1]

§ 317. Every municipal corporation which has power to make by-laws and establish ordinances to promote the general welfare, and preserve the peace of a town or city, may fix the time or places of *holding public markets* for the sale of food, and make such other regulations concerning them as may conduce to the public interest.[2] The right to establish a market includes the right to abandon it, or shift it to another place when the public convenience demands it, and of this the council is the judge.[3]

§ 318. *Nature of Power to Establish and Regulate.*— A city corporation was invested by its charter with power "to erect market houses, to establish markets and market places, and to provide for the government and regulation thereof," and it was at first decided by the Supreme Court of the state that this did not authorize the corporation to pass an ordinance *delegating* to an individual the right to erect market houses, and to charge rent for the use of the stalls therein, reserving to itself

[1] Wartman *v.* Philadelphia, 33 Pa. St. 202, 210, 1854; St. John *v.* New York, 3 Bosw. (N. Y.) 483; State *v.* Mobile, 5 Port. 279, 1837; Commonwealth *v.* Rush, 14 Pa. St. (2 Harris) 186; Commonwealth *v.* Bowman, 3 Pa. St. (3 Barr.) 202, 206. See chapter on Streets, *post.*

[2] *Per Black,* C. J., Wartman *v.* Philadelphia, 33 Pa. St. 202, 209, 1854. Note his observations in this case upon the necessity and convenience of markets.

[3] *Ib.* "The right to *establish* markets is a branch of the sovereign power, and the right *to regulate* them is necessarily a power of municipal police:" *Per Eustes,* C. J., Municipality *v.* Cutting, 4 La. An. 335.

no power to *control* the same, and that the corporation could not compel persons to go to such markets; but subsequently this ruling was reversed, and it was held that such an ordinance was valid, and that the city had the power to authorize the erection of market houses by an individual, and to declare the same a public market, and to covenant to protect the owner in the exclusive privilege thereof; and that the city was liable for failing to protect him by the passage of the requisite ordinances, he having, on the faith of the ordinance, erected an expensive market house.[1]

§ 319. *Construction of Special Powers in Relation to Markets.* Power to make "by-laws relative to the public markets," &c., while it would not authorize a corporation entirely to prohibit the sale of meats, &c., within its limits, because this would be in general restraint of trade, will nevertheless authorize a by-law forbidding the *hawking about* or *selling by retail* meats, &c., except at the public markets and within certain limits about

[1] LeClaire *v.* Davenport, 13 Iowa, 210, 1862; overruling, Davenport *v.* Kelly, 7 Iowa, 102. It may be suggested that the right to pass such an ordinance, and the liability for failing to pass others, may admit, at least, of fair debate, in view of the surrender of a city of its charter powers, and its inability in law to make binding contracts with reference to the future exercise of its legislative authority. In the Kelly case, *supra*, the point was decided, and is not overruled, that the charter power to establish markets, &c., conferred upon the council the authority to prohibit the exposing and offering for sale meat at any other places than those the ordinance designated: Ash *v.* People, 11 Mich. 347; Hatch *v.* Pendergast, 15 Md. 251.

A city in granting a license and selling to a party the right to occupy a stall in the city market does not *impliedly* contract to *protect* the lessee from competition by unlicensed persons; nor can such a contract be implied against the corporation from the existence of an ordinance prohibiting the same; and the failure of the officers of the corporation, though willful, to enforce the ordinance against unlicensed sellers, is no defence to a bond given by the lessee for the payment of stall rent: Peck *v.* Austin, 22 Texas, 261, 1858. Nor does a city owning and leasing a market house impliedly engage or covenant that it will not exercise its power to establish markets by erecting other market houses and leasing them to others; if it does so, the injury to the first lessees is *damnum absque injuria:* Congot *v.* New Orleans, 16 La. An. 21, 1861. As to duty of corporation where they sell or farm out an exclusive privilege to vend articles, to enforce ordinances designed to protect the privilege: La Rosa *v.* Mayor, 4 La. 24; Same *v.* Same, 1 *ib.* 126; Mayor, &c. *v.* Peyroux, 6 Martin (La.), 155; Griffin *v.* Mayor, 5 Martin (La.), 279.

the same.[1] The courts differ somewhat in their construction of the extent of the power to *establish* and *regulate* markets, as will be seen by the cases cited in the note.[2]

[1] Buffalo *v.* Webster, 10 Wend. 100, 1833. Chief Justice *Savage* affirms, *arguendo*, that such an ordinance would be valid under the common law power of corporations to make by-laws for the general good of the corporation: *Ib.* Approving Pierce *v.* Bartram, Cowp. 269; following, Bush *v.* Seabury, 8 Johns. 418, 1811, and distinguished from Dunham *v.* Rochester, 5 Cow. 462; Shelton *v.* Mobile, 30 Ala. 540, 1857. "The fixing the *place* and times at which markets shall be held and kept open," says the Supreme Court of New York in Bush *v.* Seabury, 8 Johns. 418, "and the prohibition to sell at other places and times, are among the most ordinary regulations of a city or town police, and would naturally be included in the general power to pass by-laws relative to the public markets. If the corporation had not the power in question, it is difficult to see what useful purpose could be effected, or what object was intended, by the grant of power to pass laws 'relative to the public markets.'"

[2] Power to make ordinances concerning "markets, health, and good order" of the town, authorizes an ordinance prohibiting the sale of butcher's meat within the corporate limits, excepting at the public market: Winsboro *v.* Smart, 11 Rich. (South Car.) Law, 551, 1858. It seems the defendant was convicted, though he sold the meat inside his own blacksmith shop. Such ordinances are sustained, says the court, on the ground that they are not in restraint of trade, but a proper regulation of it: *Ib.* So, in the City of St. Louis *v.* Jackson, 25 Mo. 37, 1857, where it appeared that the city, under proper authority, had erected a public, or city, market house, and that by its charter it had power, also, "to *regulate*," by ordinance, the sale of meats, it was held that this gave the city authority to provide, by ordinance, that "no person, not a lessee of a stall in the market, shall sell, or offer for sale, meat in less quantities than one quarter." The court considered such an ordinance as reasonable, highly proper, and not in restraint of trade, and not embraced in the reasoning in the case of Dunham *v.* Trustees of Rochester, 5 Cow. (N. Y.) 462; S. P. see, also, St. Louis *v.* Weber, 44 Mo. 547, 1869; LeClaire *v.* Davenport, 13 Iowa, 210; Davenport *v.* Kelly, 7 Iowa, 102; Ash *v.* People, 11 Mich. 347. But in Caldwell *v.* Alton, 33 Ill. 416, 1864, where the city, by its charter, had power "*to establish and regulate markets*," and under the power passed an ordinance forbidding, during market hours, the sale of vegetables outside the limits of the market, it was held that the city could not restrain a regular dealer or merchant from vending vegetables at his place of business outside of market limits during any part of the day, such a restraint of trade being unreasonable. The court reviewed many of the cases in other states on this subject, and were of opinion that the power to *regulate* could only extend to the market limits, and that these limits could not, under this power, be made to extend throughout the city. The court adhered to its views in a subsequent case in which it was held that power "to erect market houses, establish markets and market places, and provide for the government and regulation thereof," does not

§ 320. In a well considered case in Massachusetts it is decided that a city corporation has the clear right to prohibit, by ordinance, the occupation of a stand, for the vending of commodities, in the streets. It may thus prohibit not only its own inhabitants, but others. It may make the prohibition absolute, or it may make it conditional on obtaining license or permission. It is in the nature of a police regulation, and does not violate private rights or improperly restrain trade.[1]

authorize the council of a large and growing town to fix upon one market place, and prohibit all persons at all hours of the day from selling fresh meats elsewhere. Such an ordinance was regarded as unreasonable, in restraint of trade, and tending to create a monopoly. It was admitted, however, that if the ordinance had fixed a reasonable number of hours each day in which the prohibition should operate, leaving persons free to sell outside of market hours, it would probably be unobjectionable: Bloomington *v.* Wahl, 46 Ill. 489, 1868. So, in Bethune *v.* Hughes, 28 Geo. 560, 1859, the court, leaning against exclusive privileges, held that power by the charter to the corporation "*to establish and keep up* a public market in the city for the sale of," &c., does not confer upon the city power to pass an ordinance prohibiting the sale of marketable articles elsewhere than at the market place: S. P. St. Paul *v.* Laidler, 2 Minn. 190, 1858; commented on and disapproved in St. Louis *v.* Weber, 44 Mo. 547, 1869; see St. Paul *v.* Coulter, 12 Minn. 41. An ordinance regulating the killing and bleeding of meats is authorized by power to regulate butchers, the place and mode of selling, and to prevent unlicensed persons from acting as butchers: City of Brooklyn *v.* Cleves, Hill & Denio, Suppl. 231, 1843. Under power to regulate the vending of meats, a conviction under an ordinance forbidding the sale of unwholesome meats and other provisions cannot be sustained for selling putrid eggs: Mayor, &c. of Rochester *v.* Rood, Hill & Denio, Suppl. 146.

[1] Nightingale, Petitioner, &c. 11 Pick. 168, 1831. In this case the ordinance of the city (Boston) provided "that no inhabitant of the city of Boston, or of any town *in the vicinity* thereof, not offering for sale the produce of his own farm, &c., should, without the permission of the clerk of Faneuil Hall market, be suffered to occupy any stand with cart, sleigh, or otherwise, for the purpose of vending commodities in either of the streets mentioned in the first section of this ordinance," &c. It was objected against this ordinance that it was void: 1. Because it was partial, not operating upon all the citizens of the state equally. 2. Because it was uncertain, the term "*vicinity*" being indefinite. And, 3. Because it was in restraint of trade. But neither of these objections was considered tenable. The validity of such an ordinance was again affirmed by the same court in Commonwealth *v.* Rice, 9 Met. 253, 1845. See this case, also, as to requisites, in certain respects, of complaints for the violation of such an ordinance, and as to what acts will be deemed to be violations: Shelton *v.* Mayor, &c. of Mobile, 30 Ala. 540, 1857; Wartman *v.* Philadelphia, 33 Pa. St. 202, 1854. An ordi-

§ 321. But authority to erect a market, and power "to regulate the general police," and "to preserve the peace and good order of the city," do not authorize the corporation to impose a *tax* for revenue purposes upon persons occupying market stands in *the streets*, or selling produce therein. Such a power must be plainly conferred or it will not be held to exist.[1]

§ 322. The right to *regulate* markets established by a city under its charter is one of municipal police. The city authorities may say what articles shall or shall not be sold at the public markets, and may impose penalties on those who violate their ordinances. They may, for example, prohibit groceries and oysters from being sold at the public markets, and require oysters, which have a great tendency to putrefaction, to be sold at certain designated stands, and prevent their being sold elsewhere.[2]

§ 323. *Inspection Ordinances.* — A municipal corporation, says Mr. Willcock, may regulate the manner of carrying on trade within a municipality so far as to prevent monopoly, or the sale of unfit commodities, and to insure proper conduct in those who practice it within their jurisdiction.[3] In general, it may be said, that incorporated cities and larger towns in this country have conferred upon them the power to pass ordi-

nance forbade the sale of fresh meats except by persons licensed, but contained a proviso in favor of *farmers*, authorizing them to sell meats, the *produce of their own farms*. The evident object was considered to be to protect *licensed butchers*, and at the same time to allow farmers to come in and sell the produce of their own farms. It was held that an unlicensed *butcher* was not a "*farmer*" within the meaning of the *proviso*, although the meats which he sold came from sheep fattened on his farm, if the farm was only a convenient appendage to his business as a butcher: Rochester *v.* Pettinger, 17 Wend. 265, 1837.

[1] Kip *v.* Patterson, 2 Dutch. (N. J.) 298, 1857. This power, it was said, would authorize "the renting of stalls in the market house, and perhaps of even prohibiting sales in the public streets." *Ib. per Elmer*, J.

[2] Municipality *v.* Cutting, 4 La. An. 335, 1849; Morano *v.* Mayor, 2 La. 218. Power of city to vacate leases and stalls in public market, under ordinance reserving the right, see City Council *v.* Goldsmith, 2 Speer's (South Car.) Law, 428. Occupant of city market failing to pay rent in advance, according to contract, held a tenant *at will:* Dubuque *v.* Miller, 11 Iowa, 503. Control over tenants: Wœlpper *v.* Philadelphia, 38 Pa. St. 203.

[3] Willc. Corp. 142, pl. 332.

nances regulating, to a reasonable extent, the mode in which the traffic of the place shall be conducted; but they can exercise no powers in this respect not conferred.[1] Laws requiring articles to be inspected or weighed and measured before being sold, are in the nature of police regulations, and are valid in the absence of special constitutional provisions. When reasonable in their nature, they are not regarded as being in restraint of trade.[2]

§ 324. Power to a city "to regulate the public market, and to pass such other ordinances as shall seem meet for the improvement and good government of the city," authorizes an ordinance requiring oats, hay, &c., to be weighed by the public weighmaster before being offered for sale, and imposing a penalty for its violation.[3]

[1] Nightingale's Case, 11 Pick. 108; Stokes *v.* New York, 14 Wend. 87; Raleigh *v.* Sorrell, 1 Jones (North Car.), Law, 49; Chicago *v.* Quimby, 38 Ill. 274, 1858; Howe *v.* Norris, 12 Allen, 82; Libby *v.* Downey, 5 Allen, 299; Collins *v.* Louisville, 2 B. Mon. 134, 1841. Power to appoint measures of wood, and affix a reasonable allowance to them, does not justify the imposition of a tax for revenue: *Ib.*

[2] Cooley, Const. Lim. 596; Raleigh *v.* Sorrell, *supra;* Stokes *v.* New York, *supra;* Page *v.* Fazakerly, 36 Barb. 392; Mayor, &c. of New York *v.* Nichols, 4 Hill (N. Y.), 209, 1843; compare Mayor *v.* Hyatt, 3 E. D. Smith, 156; Rogers *v.* Jones, 1 Wend. 287; Yates *v.* Milwaukee, 12 Wis. 673. The system of *inspection laws*, and the hosts of officers which they engendered, were considered by the constitutional convention of New York to entail annoyances and burdens upon the community sufficient to outweigh any benefits resulting from them; and the constitution of 1846 (Art. V. Sec. 8) abolished all such offices and forbade the legislature to re-create them, in this language: "All offices for the weighing, measuring, culling, or inspecting of any merchandise, produce, manufacture, or commodity whatever, are hereby abolished, and no such offices shall hereafter be created by law." See Tinkham *v.* Tapscott, 17 N. Y. 144, 147, 1858, where the origin, scope, and purpose of this provision are very satisfactorily discussed by *Denio*, J. In Illinois it is held that inspection power conferred upon a board of trade, to be exercised when requested by its members, may co-exist with like power in the city authorities to be exercised in all cases when requested: Chicago *v.* Quimby, 38 Ill. 274, 1858.

[3] Raleigh *v.* Sorrell, 1 Jones (North Car.) Law, 49, 1853; approving Nightingale's Case, 11 Pick. 108; Stokes *v.* Corporation of New York, 14 Wend. 87. This power was also held to authorize the creation of the office of weighmaster and the payment of his salary: 1 Jones, 49, *supra.* Construction of ordinance as to weighing hay on public scales: Goss *v.* Corporation,

§ 325. A grant to the common council of "all powers, rights, &c., incident to municipal corporations and necessary to the proper government of the same," might authorize a city to prevent the sale of bread made out of unwholesome flour, and, as a consequence, to provide for its inspection, but it would not give the power to regulate the assize, that is, the weight and price of bread, for the latter is a power not absolutely necessary for the proper government of a city. Power, however, to a city, "to regulate everything which relates to bakers," does authorize an ordinance regulating the weight, size, and, it seems, the price, of bread, and the forfeiture of bread illegally baked; and such an ordinance, it has been held, is not in violation of any provision of the constitution of Louisiana.[1]

§ 326. *Police Regulations Respecting the Public Peace and Safety.* — Our city governments usually possess the power, either by express grant or by virtue of their authority to make by-laws relating to the public safety and good order of the inhabitants, to regulate the rate of *speed of travel* in the *public streets;* the route or streets over which omnibuses, stage-coaches, drays, &c., may run; the time of day in which the streets may be used for certain purposes; to interdict stoppages in the street to the delay of others; to exclude vehicles of all kinds from entering upon or passing over the sidewalks, &c., &c. The public safety and convenience may require regulations of this character; but they must not, unless made by virtue of specific authority, be unreasonable or improperly in restraint of trade.[2]

&c. 4 Sneed (Tenn.), 62; Yates *v.* Milwaukee, 12 Wis. 673. Construction of statute as to mode of measuring grain: Frazier *v.* Warfield, 13 Md. 279. Of ordinance as to survey of lumber before sale: Briggs *v.* Boat, 7 Allen, 287.

[1] Guillotte *v.* New Orleans, 12 La. An. 432, 1857; Page *v.* Fazakerly, 36 Barb. 392. But as to forfeiture, *quære*, in absence of express power, and see Phillips *v.* Allen, 41 Pa. St. 481; Mayor, &c. of Mobile *v.* Yuille, 3 Ala. 139.

[2] Commonwealth *v.* Stodder, 2 Cush. 562, 1848, where the subject of the power of cities over streets, particularly in reference to omnibuses, is fully considered by Mr. Justice *Dewey;* Commonwealth *v.* Robertson, 5 Cush. 438, 1850, as to stoppages in streets contrary to ordinance; Baker *v.* City of Boston, 12 Pick. 184, 1831; Vanderbilt *v.* Adams, 7 Cow. 349; *Ib.* 385; Austin *v.* Murray, 16 Pick. 126. Power to a city "to *regulate* the *running* of rail-

§ 327. Under a general power to make "needful and salutary by-laws," a city ordinance of Boston, requiring the tenant or occupant, or, in case there shall be no tenant, the owners of buildings bordering on *certain* streets, *to clear the snow from the sidewalks* adjoining their respective buildings, is reasonable and valid. It was objected against this ordinance that it violated the fundamental maxim, that all burdens and taxes laid upon the people for the public good shall be equal. The objection was overruled. And it was justly regarded by the court as in the nature of a police regulation, requiring a duty to be performed highly salutary and advantageous to the citizens of a populous and closely built city, and imposed upon the persons named because they are so situated, as that they can promptly and conveniently perform it; and it is laid not upon a few, but upon a numerous class, and equally upon all who are within the description composing the class and who commonly derive a peculiar benefit from the duty required. It would doubtless be otherwise if the ordinance arbitrarily imposed this duty upon the mechanics, or merchants, or any other class of citizens between whose convenience and the labor required there is no natural relation.[1]

§ 328. The power to make "salutary by-laws," with respect to the use of streets, will, it seems, authorize a city to pass by-laws regulating the *removal of buildings*, and the temporary use of the streets and highways for that purpose.[2]

road cars," authorizes the adoption of an ordinance prohibiting the propulsion of cars by *steam* within the corporate limits: Railroad Company *v.* Buffalo, 5 Hill (N. Y.), 209, 1843. *Post*, chapter on Streets.

A by-law prohibiting *rapid driving* in the streets of a city by carters and others is not in restraint of trade, and is reasonable and valid; and in a prosecution for its violation, it is not necessary to prove that any individual was actually endangered by the fast driving. As the mayor and aldermen have no authority to give a person permission to violate an ordinance, evidence of such permission, as well as evidence of the defendant's general character as a careful driver, is inadmissible: Commonwealth *v.* Worcester, 3 Pick. 462, 1826; Commonwealth *v.* Stodder, 2 Cush. 562, 570, 1848; Washington *v.* Nashville, 1 Swan, 177. *Post*, chapter on Streets.

[1] Goddard, Petitioner, &c. 16 Pick. 504, 1835; Union Railway Company *v.* Cambridge, 11 Allen, 287; Kirby *v.* Boylston Market Association, 14 Gray, 252.

[2] Day *v.* Green, 4 Cush. 433, 437, *per Shaw*, C. J. And where such a by-law prohibits the moving without a license granted by the mayor *and alder-*

§ 329. *Ordinances under Police Power and General Welfare Clause.* — Other illustrations of what a municipal corporation may do under the general welfare clause in its organic act, or under its police power or its implied right to pass by-laws, or under a general grant of authority for that purpose, may be here given.

Under authority "to ordain and publish such acts, laws, and regulations, not inconsistent with the constitution and laws of the state as shall be needful to the *good order* of the city," it can, says *Howard*, J., "subject to these restrictions and certain statute regulations, establish all suitable ordinances for administering the government of the city, the preservation of the health of the inhabitants, and the convenient transaction of business within its limits, and for the performance of the general duties required by law of municipal corporations."[1]

§ 330. Power to pass such ordinances "to maintain the peace, good government, and order of the city, and the trade commerce and manufactures thereof, as the council may deem expedient, not repugnant to the constitution and laws of the state," authorizes an ordinance prohibiting the *keeping open of stores*, shops, and places of business *on Sunday*, if its provisions do not conflict with state legislation.[2] But the general

men, a license granted by the mayor is void, even though the board of aldermen, by a vote, had previously undertaken to delegate the power to grant such licenses to the mayor alone. The by-law contemplates that the mayor and aldermen should act unitedly as one body: *Ib.*

[1] *Per Howard*, J., State *v.* Merrill, 37 Maine (2 Heath), 329, 1853. Such would undoubtedly be the proper construction if this were the only power given to the city to pass ordinances or by-laws. It should then be somewhat liberally construed. But if such a general grant is given in connection with, or at the end of, a long list of specific powers, perhaps so extended a construction might not then be due to it. The power conferred by general welfare clause is restricted by reference to other provisions of the charter or constituent act: City Council *v.* Plank Road Company, 31 Ala. 76, 1857; Mount Pleasant *v.* Breeze, 11 Iowa, 399, 400, 1860, *per Wright*, J.

[2] St. Louis *v.* Cafferata, 24 Mo. 94, 1856; see State *v.* Cowan, 29 *ib.* 330; State *v.* Ams (constitutionality of Sunday laws affirmed), 20 Mo. 214; S. P. Frolichstein *v.* Mobile, 40 Ala. 725, 1867; Hudson *v.* Geary, 4 Rh. Is. 485, 1857; Specht *v.* Commonwealth, 8 Pa. St. 312; Cincinnati *v.* Rice, 15 Ohio, 225. In the case of the City Council *v.* Benjamin, 2 Strob. (South Car) Law, 508, 1846, it was decided by the Court of Appeals of South Carolina, that an

welfare clause does not authorize a city to construct, or aid in constructing, a *plank road or toll bridge* built by a private company beyond the corporate limits of the city.[1]

§ 331. The general welfare clause to pass ordinances for the good government, &c., of the corporation, does not authorize an ordinance requiring the *proprietor of a theatre*, circus, or other exhibition licensed by the corporation, *to pay a peace or police officer* of the place two dollars, or any sum, for each night's attendance upon such place for the purpose of enforcing order. Such an ordinance is unreasonable, and can only be passed when clearly authorized.[2]

§ 332. Where a city corporation is authorized "to ordain such laws not inconsistent with the constitution and laws of the state as shall be needful to the *good order* of the city," it may pass an ordinance imposing a penalty upon any person who shall mutilate or *destroy* any *ornamental tree* planted *in the streets*, lanes, or other public places within the limits of the city." Such an ordinance is not inconsistent with a state law punishing the *malicious* or *wanton* destruction of trees growing for ornament or use. Under the ordinance it is not necessary to allege or prove that the mutilation was malicious or wanton,

ordinance of the city of Charleston, prohibiting "public exposures for sales, or sales of merchandise, on Sunday," was not a violation of that section of the state constitution which declares that "the free exercise and enjoyment of religous profession or worship, without discrimination or preference, shall forever hereafter be allowed within this state to all mankind." In that case the defendant was a Jew, and the city was not denied to be possessed of all the power on the subject which the legislature could constitutionally bestow. In the case of Columbia *v.* Duke and Marks, cited 2 Strob. 530, and approved, a similar decision was made at *nisi prius* by Mr. Justice *Martin*. And in this last case it was further ruled, that power in the charter "to establish such by-laws as may tend to the quiet, peace, safety, and good order of the inhabitants," authorized the passage of such an ordinance. Under "full power to pass such ordinances as the city council shall deem expedient for the government of the city, not contrary to the constitution of the state or the United States," a city may prohibit, within its limits, the sale of liquor on Sunday: Megowan *v.* Commonwealth, 2 Met. (Ky.) 3, 1859.

[1] City Council *v.* Plank Road Company, 31 Ala. 76, 1857. *Ante*, Sec. 106.

[2] Waters *v.* Leech, 3 Ark. 110, 1840. *Supra*, Sec. 253.

and it would seem to be considered that it was no defence that the tree alleged to be mutilated was upon the street in front of the lot of the accused, who owned, subject to the public easement, *ad medium filum viæ*.[1]

§ 333. Under a general power to pass "any other by-laws for the well-being of the city," its council may, by ordinance, prohibit saloons, restaurants, and other places of public entertainment, to be kept open after ten o'clock at night. The objections that such a by-law was unreasonable, and deprived the citizen of the constitutional right of "acquiring property," were not considered to be well taken. It regulates, but does not deprive the party of his rights.[2]

§ 334. Power "to regulate the police of the city," and to pass ordinances not inconsistent with law, authorizes an ordinance for *arresting and fining vagrants*, although, by the general law of the state, vagrants may be proceeded against before a justice of the peace, the court considering that this did not forbid the corporation from making a local regulation on the same subject not in conflict with the general law.[3]

[1] State *v.* Merrill, 37 Maine (2 Heath), 329, 1853. This would seem to be a quite liberal construction of the words *good order*. But it is necessary that cities should have such an authority, and the power to pass the ordinance could, perhaps, be sustained as incidental to the power of the city over its streets and public places. *Post*, chapter on Streets.

[2] The State *v.* Freeman, 38 N. H. 426, 1859; following and approving on this point, State *v.* Clark, 8 Fost. (N. H.) 176; Morris *v.* Rome, 10 Geo. 532, 1851; Hudson *v.* Geary, 4 Rh. Is. 485, 1857. "It is an unavoidable consequence of city ordinances, that they in some degree interfere with the unlimited exercise of private rights:" *Per Bell*, J., in State *v.* Freeman, 38 N. H. 428.

[3] St. Louis *v.* Bentz, 11 Mo. 61, 1847; distinguished from Jefferson City *v.* Courtmire, 9 *ib.* 692, which was a summary proceeding for an *indictable* offence. See State *v.* Cowan, 29 Mo. 330; Byers *v.* Commonwealth, 42 Pa. St. 89, *per Strong*, J.; Shafer *v.* Mumma, 17 Md. 331, 1861. *Supra*, Sec. 302.

A *statute* by which "two or more overseers of the town" were authorized to commit to the workhouse until discharged by law, by writing under their hands, to be there employed and governed according to the rules and orders of the house," &c., "all persons, able of body to work, and not having estate or means otherwise to maintain themselves, who refuse or neglect to do so, live a dissolute, vagrant life, and exercise no ordinary calling or lawful business sufficient to gain an honest livelihood," does not violate the

§ 335. By virtue of its police power, a municipal corporation may pass an ordinance imposing a fine upon the owner of any *animal found estray* or at large within the limits of the corporation.[1]

§ 336. If a municipal corporation has, by its charter, power to pass ordinances to preserve the peace and good order of the place, this gives it authority to provide for the punishment, in the manner allowed by its charter, of persons who shall rescue, or attempt to *rescue*, *prisoners* from the custody of the municipal officers.[2] But the general power, though expressly conferred, to enact by-laws for the good government of the town, does not confer the power to *levy taxes* of any kind, not even upon retailers of ardent spirits.[3]

§ 337. *General Welfare Clause Continued.* — The general welfare clause, in a charter empowering the city council to pass such other ordinances as appear necessary for the *security* of the city, authorizes an ordinance regulating the mode of keeping and sale of *gunpowder* within the limits of the corporation, such as requiring all gunpowder brought into the city to be conveyed to the public magazine of the city, except when it is to be retailed, and then to be kept in limited quantities

constitutional right to "life and liberty," or the right, in "criminal proceedings, to be heard by counsel, confronted with witnesses," &c. The court did not regard it as a criminal proceeding, but as a reformatory or correctional one, so far as the person proceeded against was concerned, and designed to protect the community from becoming chargeable with the person's support: Adeline Nott's Case, 11 Maine, 208, 1834; S. P. Portland *v.* Bangor, 42 Maine, 403, 1856, *Rice*, J., dissenting. See Byers *v.* Commonwealth, 42 Pa. St. 89. In a late case in Illinois, the Supreme Court of that state decided that the act creating the Reform School was unconstitutional, and that the act, so far as it restrained liberty for any cause except actual crime, was in violation of the Bill of Rights: People *v.* Turner, 10 Am. Law Reg. (N. S.) 366, and approving note of Judge *Redfield*.

[1] Municipality *v.* Blanc, 1 La. An. 385, 1846; Case *v.* Hall, 21 Ill. 632; Commonwealth *v.* Bean, 14 Gray, 52; Commonwealth *v.* Curtis, 9 Allen, 266; Roberts *v.* Ogle, 30 Ill. 459; McKee *v.* McKee, 8 B. Mon. 433, 1848. *Supra*, Sec. 282.

[2] Independence *v.* Moore, 32 Mo. 392, 1862.

[3] Commissioners of Ashville *v.* Means, 7 Ire. (Law) 406, 1847; *Ex parte* Burnett, 30 Ala. 461, 1857. *Post*, Chap. XIX.

and in secure canisters. And it was so held, notwithstanding the point was made in argument that the general welfare clause in the charter could not enlarge the powers of the corporation further than is necessary to carry into effect the specific grants of power.[1]

§ 338. Municipal corporations, with power to provide for the safety of their inhabitants, may prohibit the throwing of heavy or *dangerous articles*, from the upper stories of buildings, *into the streets* or open spaces near them, where persons are in the habit of passing; and may establish *fire limits*, and prevent erection therein of *wooden buildings*.[2]

§ 339. Under authority to make police regulations, or to pass by-laws for the good rule and government of the corporation, it has the power to require *hoistways inside* of stores (usually places of public resort) to be enclosed by a railing, and closed by a trap door after business hours each day. It was justly regarded as a reasonable police regulation not unnecessarily interfering with private rights.[3]

[1] Williams *v.* Augusta, 4 Geo. 509, 1848; Frederick *v.* Augusta, 5 *ib.* 561, where the charter of Augusta is more fully given.

[2] City Council *v.* Elford, 1 McMullen (South Car.) Law, 234, 1841; Brady *v.* Insurance Company, 11 Mich. 425; Douglass *v.* Commonwealth, 2 Rawle, 262; Wadleigh *v.* Gilman, 12 Maine, 403; Vanderbilt *v.* Adams, 7 Cow. 349, 352, *per Woodruff*, J., *arguendo*. Instance of a want of power to restrict erection of wooden buildings: Mayor, &c. *v.* Thorne, 7 Paige, 261. Cities may constitutionally be authorized to prevent the erection of *wooden buildings* in certain portions thereof: Respublica *v.* Duquet, 2 Yeates (Pa.), 493. In Wadleigh *v.* Gilman, *supra*, it was decided that the *removal* of a wooden building to the prohibited district, or even from one part of the district to another, was within the meaning of the term, *erection*, as used in the ordinance. "The mischief," says *Weston*, C. J., "did not consist in the act of erecting, but in the continuance of the erection. The ordinance did not meddle with erections as they stood; this would have transcended their power." Difference between "erecting" and "repairing:" Brady *v.* Insurance Company, 11 Mich. 425, 449, opinion of *Campbell*, J.; Brown *v.* Hunn, 27 Conn. 332; Booth *v.* State, 4 Conn. 65; Tuttle *v.* State, *ib.* 68; Stewart *v.* Commonwealth, 10 Watts, 307. Remedy against wrong-doer, by private action in favor of an adjoining owner specially injured by a violation of a statute in relation to the erection of wooden buildings: Aldrich *v.* Howard, 7 Rh. Is. 199.

[3] Mayor, &c. of New York *v.* Williams, 15 N. Y. 502, 1859. *Johnson*, J., observes: "The danger is not confined to the owner and ordinary occu-

§ 340. Power "to prevent disturbances and disorderly assemblages, and maintain the good government of the city," authorizes it to take measures *to preserve the peace* and to protect the lives and property of the citizens, and the acts of the city in procuring a loan of arms and giving a bond for their return, are valid and binding upon it.[1] Authority to preserve the peace and quiet of the place authorizes an ordinance forbidding "all *disorderly shouting, dancing*, &c., in the streets and public places," though such conduct violates no existing state law.[2]

Mode of Enforcing Ordinances.

§ 341. *Civil Actions and Complaints.* — In the old corporations in England, by-laws were usually made in virtue of their implied power; they did not extend to matters criminal in their nature, and could only be enforced, unless by virtue of a statute or valid custom, by fines or pecuniary penalties commonly for a small sum, and always, or almost always, in a fixed or certain amount.[3] So, by the Municipal Corporations Act of 1835, the council are empowered to make such by-laws as to them shall seem most for the good rule and government of the borough, and for the prevention and suppression of all such nuisances as are punishable by act of parliament in force

pants of the building. The ordinance, in that respect, stands on the same footing as a regulation prohibiting a well or cistern in a man's yard unprotected by curb or cover, the reasonableness of which could not be doubted. In case of fire, these openings would tend directly and powerfully to allow the fire to extend through all parts of the building, and, if left uncovered, would also tend to endanger those whom duty might require to enter to effect the extinguishment of the fire." *Paige*, J., considered the ordinance the same in principle as fire laws, prescribing the heighth, thickness of walls, and materials of building within the city.

[1] State *v.* Buffalo, 2 Hill (N. Y.), 434, 1842; New Orleans *v.* Costello, 14 La. An. 37.

[2] Washington *v.* Frank, 1 Jones (N. C.) Law, 436, 1854. As to what regulations of this kind are necessary, "much," says the court, "must be left to the judgment and discretion" of the corporate authorities: *Ib.* State *v.* Bell, 13 Ire. (Law) 373. *Post*, Chap. XIII.

[3] Gee *v.* Wilden, Lutw. 1320, 1324; Wood *v.* Searl, Bridg. 139; Piper *v.* Chappell, , 14 M. & W. 624; Rawlinson on Corp. 665, note. See *post*, chapter on Municipal Courts.

in the borough, and to appoint, by such *fines* as they shall deem necessary for the prevention and suppression of such offences, with the proviso that no fine shall exceed the sum of five pounds.[1] The act provides that prosecutions for a breach of by-laws made under it, shall be commenced within three months after the commission of the offence; that the charge shall be made on oath; that a summons shall issue and be served, with power to the magistrate to proceed without the appearance of the defendant, or to issue a warrant for his arrest; that if convicted, the penalty shall be paid either immediately or within such period as the magistrate shall think fit; that it may be levied by distress and sale of the goods and chattels of the offender, and for want of sufficient distress the offender may be imprisoned for a term not exceeding one month, the imprisonment to cease upon payment of the sum due.[2] It is suggested that the remedy thus prescribed is cumulative, and will not debar the corporation from availing itself of the usual common law mode of enforcing a by-law by action of debt or assumpsit.[3] But the point seems not to have been yet adjudged.

§ 342. Aside from statutory regulation, the general method of enforcing a by-law in England is, as just stated, by bringing, in the name of the proper party or corporation, an action, in the proper court, against the person who has violated the by-law, to recover the penalty which it imposes, and this action may be either debt or assumpsit. By the common law, assumpsit may be maintained for the breach of any duty which the defendant has been legally liable to perform in favor of the plaintiff, the law implying a promise to perform the particular act, and hence no principle was violated in holding that assumpsit would lie to recover the penalty of a by-law. As the penalty was for a sum certain, and was consid-

[1] 5 and 6 Will. IV. Chap. LXXVI. Sec. 90. *Ante*, p. 51.

[2] *Ib.* Sec. 91; Secs. 127–133. *Supra*, Sec. 271.

[3] Rawlinson on Corp. (5th ed.) 167, note. See Adley *v.* Reeves, 2 Maule & Sel. 61; Bodwic *v.* Fennell, 1 Wils. 233. On the other hand, Mr. Grant is of opinion that the remedy prescribed by the act is exclusive, and supersedes the common law remedy of debt or assumpsit for the amount of the fine or penalty: Grant on Corp. 364. *Supra*, Secs. 271–275.

ered to be in the nature of liquidated damages, an action of debt would also lie to recover the amount of the penalty; but where the by-law itself provided that the penalty should be recovered by debt, then that form of action alone could be maintained. But, aside from statute authority or a valid custom, it was not competent for the by-law to provide that its penalty should be recovered by "distress and sale" of goods, that being contrary to the common law.[1]

§ 343. In *this country*, the courts hold that where the mode of enforcement is prescribed by the charter, that mode must be pursued;[2] but if the mode or form of action is not prescribed, then the recovery of the penalty or fine for the violation of a municipal ordinance may be as at common law, by an action of debt or assumpsit, or where these forms are abrogated, by a civil action in substance the same.[3] And where such an action is brought, the proceeding is civil and not criminal, and the rules of procedure in civil cases, unless otherwise

[1] Willc. 164–181; 1 Saund. Pl. and Ev. 683; 2 Wheat. Selw. 1178; 2 Chitty Pl. 401, where form of declaration in debt is given; Adley *v.* Reeves, 2 M. & S. 60. The law implies a promise on the part of a corporator to pay all penalties incurred for his violation of by-laws; and if the mode of enforcing such penalties is not pointed out, the corporation may sue therefor in any competent court: Columbia *v.* Harrison, 2 Const. (South Car.) Rep. 213, *per Nott*, J. *Supra*, Secs. 270–280.

[2] Weeks *v* Foreman, 1 Harris. (N. J.) 237, 1837; Ewbanks *v.* Ashley, 36 Ill. 177, 4864; Israel *v.* Jacksonville, 1 Scam. (Ill.) 290; Williamson *v.* Commonwealth, 4 B. Mon. 146, 151, 1843. An action may be brought for the fines and penalties incurred for the violation of ordinances, and it is not necessary that the fine be assessed before the suit is brought: King *v.* Jacksonville, 2 Scam. (Ill.) 306. In Weeks *v.* Foreman, 1 Harris. (N. J.) 237, 1837, it was held that, although certain corporate officers were *ex officio* justices of the peace within the city, with power to take cognizance of violations of by-laws, they could not entertain or try actions of *debt*, to recover a debt or penalty for a breach of an ordinance, although it was conceded that they had jurisdiction of the *quasi* criminal proceeding, founded upon a complaint or information, resulting in what is technically called a *conviction;* but *quære*. *Supra*, Secs. 270–287.

[3] Ewbanks *v.* Ashley, 36 Ill. 178, 1864; Israel *v.* Jacksonville, 1 Scam. (Ill.) 290; Coates *v.* Mayor, 7 Cow. 585, 608, 1827. Unless it is otherwise provided by statute or charter, it is considered that corporations have an inherent power to provide for the recovery of a penalty by an action of debt in their own courts: Hesketh *v.* Braddock, 3 Burr. 1858; Barter *v.* Commonwealth, 3 Pa. (Pen. & W.) 253. *Supra*, Sec. 275.

provided, are applicable to it.[1] The penalties to ordinances are often fixed upon a movable scale, and this would appear to be done under the supposition that they will be enforced, not by a common law action in the common law courts to recover the amount of the penalty, but by a complaint or proceeding before the proper municipal magistrate, who will, within the prescribed limits, determine the amount of the fine or penalty to be paid by reference to the circumstances of the particular case.

§ 344. *Nature of Proceeding, Civil or Criminal.* — Where, instead of a civil action to recover the pecuniary fine or penalty, the proceeding is in the nature of a complaint for the violation of the ordinance, this has sometimes been considered to be a criminal or *quasi* criminal, and not a civil, proceeding. The cases on this subject, however, are not harmonious, but the difference in them, to some extent, depends upon the character of the act or offence charged, the nature of the charter, and the legislation in the particular state as to extent of jurisdiction intended to be conferred upon the municipal authorities.[2] The constitution of Georgia declares that "trial by jury, as heretofore used in this state, shall remain inviolate." It was claimed that the legislature could not constitutionally confer on the city council the power to pass an ordinance inflicting a fine for its violation where the guilt of the party was to be tried by the council, without a jury. The court held that the objection was not sound, observing that violations of ordinances are not *criminal cases* within the meaning of the state constitution, and "that, inasmuch as the right of trial by jury existed in England, and was secured by *Magna Charta*, and municipal corporations in that country enforced their by-laws by *pecuniary penalties, in a summary manner*, and the same right being conferred upon similar corporations in this state anterior

[1] *Ib.;* Municipality *v.* Cutting, 4 La. An. 335; Lewiston *v.* Proctor, 23 Ill. 533, 1860; Quincy *v.* Ballance, 30 Ill. 185; Davenport *v.* Bird, Iowa, Supreme Court, December term, 1871 (not yet reported); Williamson *v.* Commonwealth, 4 B. Mon. 146, 151, 1843.

[2] Wayne County *v.* Detroit, 17 Mich, 390; People *v.* Detroit, 18 Mich. 445; Davenport *v.* Bird, 32 Iowa, December term, 1871 (not yet reported). See chapter on Municipal Courts, *post.* *Supra*, Secs. 281, 300.

to the adoption of the constitution, and constantly exercised "the right of trial by jury, as heretofore used in this state," was not violated by the city council of Augusta, by the imposition of the penalty for the breach of the *local police* regulations of that city."[1]

§ 345. On the other hand, in Massachusetts, prosecutions for breaches of by-laws or ordinances made to enforce police regulations are regarded as substantially *public* prosecutions, and in such prosecutions it is competent, though confessed not to be very just, to disallow the defendant costs. Applying this doctrine, it is held that a statute providing that prosecutions for violations of city ordinances in the name of the state or commonwealth is not unconstitutional, notwithstanding the result is that the defendant does not recover costs on acquittal.[2]

[1] Williams *v.* Augusta (gunpowder ordinance), 4 Geo. 509, 1848, *per Warner*, J., approving Low *v.* Commissioners of Pilotage, R. M. Charlt. (Geo.) 316; Flint River Steamboat Company *v.* Foster, 5 Geo. 194; Floyd *v.* Commissioners, &c. 14 Geo. 354; Kip *v.* Patterson, 2 Dutch. (N. J.) 298; Keeler *v.* Milledge, 4 Zabr. 142; Shafer *v.* Mumma, 17 Md. 331. "Summary convictions for petty offences against statutes were always sustained, and they were never supposed to be in conflict with the common law right to a trial by jury:" *Per Strong*, J., Byers *v.* Commonwealth, 42 Pa. St. 89, 94, 1862. In the case last cited, the extent of the right of jury trial at common law is learnedly examined by Mr. Justice *Strong*. See, also, Dunsmore's Appeal, 52 Pa. St. 374; Rhines *v* Clark, 51 Pa. St. 96, 1865. Compare, Plimpton *v.* Somerset, 33 Vt. 283, 1860. See *post*, *Municipal Courts*. A statute requiring security for costs, in prosecutions under "penal statutes," does not embrace prosecutions under city ordinances which impose penalties for their violation, such ordinances not being "statutes" within the meaning of the act: Lewistown *v.* Proctor, 23 Ill. 533, 1860; S. P. Quincy *v.* Ballance, 30 *ib.* 185. And see, also, Municipality *v.* Cutting, 4 La. An. 335; Ewbanks *v.* Ashley, 36 Ill. 177; Wayne County *v.* Detroit, 17 Mich. 390; People *v.* Detroit, 18 Mich. 465, construing the phrase "penal laws" as used in the Michigan constitution. Phrase "municipal fine," in the constitution of California, construed: People *v.* Johnson, 30 Cal. 98, 1866. Violations of ordinances imposing fines or penalties are in the nature of torts, and actions for such violations may be prosecuted against one or more of the offending parties — they need not all be joined: President, &c. *v.* Holland, 19 Ill. 271, 1857.

[2] Goddard, Petitioner, 16 Pick. 504, 1835; Commonwealth *v.* Worcester, 3 Pick. 462. "If," says Chief Justice *Shaw*, in the case first cited, "the prosecution were to enforce a *private* right by the city, there would be weight in

§ 346. *Mode of Pleading Ordinances.* — The courts, unless it be the courts of the municipality, do not judicially notice the ordinances of a municipal corporation, unless directed by charter or statute to do so.[1] Therefore, such ordinances, when sought to be enforced by action, or when set up by the defendant as a protection, should be set out in the pleading. It is not sufficient that they be referred to generally by the title or section. It is, however, believed to be sufficient, in the absence of special legislative provision prescribing the manner of pleading, to set forth the legal substance of that part of the

the objection, and it would stand on different grounds:" 16 Pick. 508. See Commonwealth *v.* Gray, 5 Pick. 44; Commonwealth *v.* Fakey, 5 Cush. 408. Similar observations in relation to making sidewalks, by *Ford*, J., in Paxson *v.* Sweet, 1 Green (N. J.), 196, 200, 1832. So, in New Hampshire, a public prosecution for an offence made penal by a city ordinance because of its supposed evil consequences to society — as, for example, the offence of unlawfully keeping a bowling alley — is considered to be a criminal, and not a civil, proceeding: State *v.* Stearns, 11 Fost. (N. H.) 106, 1855. Fink *v.* Milwaukee, 17 Wis. 26, 1863, is decided upon the basis that a prosecution of a party for the violation of a city ordinance, where the penalty is a fine, is a criminal prosecution to which the bill of rights applies, which declares that, "in all criminal prosecutions, the accused shall be entitled to demand the nature and cause of the accusation against him." But a principle so broad, it is believed, can hardly be maintained where the act charged is not a crime at common law or in its essential nature. See chapter on Municipal Courts, *post*. *Ante*, pp. 308–313, and notes.

[1] Trustees *v.* Leffler, 23 Ill. 90; Mooney *v.* Kennett, 19 Mo. 551, 1854; New Orleans *v.* Bondo, 14 La. An. 303, 1859; Harker *v.* Mayor, 17 Wend. 199, 1837; Case *v.* Mobile, 30 Ala. 538, 1857; People *v.* Mayor, &c. of New York, 7 How. Pr. R. 81, 1851; Cox *v.* St. Louis, 11 Mo. 431, 1848; Garvin *v.* Wells, 8 Iowa, 286; Goodrich *v.* Brown, 30 Iowa, 291, 1870. In England, when an action on a by-law founded on a custom is brought in a *court of the municipality* the court will take judicial notice of it, but in an action in the *Superior Courts* the custom and the by-law must be set out, for these courts will not take notice of them: Willc. 166, pl. 403; *ib.* 172, pl. 423; *ib.* 173, pl. 425; Broadnac's Case, 1 Vent. 196; Barber Surgeons *v.* Pelson, 2 Lev. 252; Norris *v.* Staps, Hob. 211. In Conboy *v.* Iowa City, 2 Iowa, 90, it was held that the mayor, on whom was conferred exclusive jurisdiction of the violation of the ordinances of the city, was authorized to take judicial notice, *ex-officio*, of the city ordinances. The provision of a city charter that its published and printed ordinances shall be received in evidence in all courts without further proof, does not dispense with the necessity of making them part of the record in order to bring them to the knowledge of an appellate court: Cox *v.* St. Louis, 11 Mo. 431, 1848; New Orleans *v.* Bondo, 14 La. An. 303, 1859.

ordinance alleged to have been violated, it being advisable, for purposes of identification, to refer also to the title, date, and section. The liberal rules of pleading and practice which characterize modern judicial proceedings should extend to, and doubtless would be held to embrace suits and prosecutions to enforce the by-laws or ordinances of municipal corporations.[1]

§ 347. *Requisites of Complaints.*— Under a charter authorizing "complaint" to be made of the violation of ordinances, but not prescribing the mode or requisites, a complaint is not in the nature of an information by a common informer, and the same strictness is not required as in an information or indictment. "It is sufficient if it sets out with clearness the offence charged, and the substance of that part of the ordinance which has been violated, with a reference to the title, date, or section." [2]

[1] Harker *v.* Mayor, &c. 17 Wend. 199, 1837. See Stokes *v.* Corporation of New York, 14 Wend. 87; Mooney *v.* Kennett, 19 Mo. 551, 1854. In justifying, the defendant must set out in his plea or answer the ordinance, or so much thereof as will show on what the defence rests: *Ib.*; Keeler *v.* Milledge, 4 Zabr. (N. J.) 142, 1857. It is sufficient to set out the substance of that part of the ordinance which has been violated with a reference to the title, date, and section: *Ib.*; approved, Kip *v.* Patterson, 2 Dutch. (N. J.) 298. Regularly, the by-law or its substance should be set forth: Case *v.* Mobile, 30 Ala. 538, 1857; Charleston *v.* Chur, 2 Bailey (South Car.), 164. In England, the by law itself must be fully set out in an action of *debt* upon it, and not by way of recital; but in *assumpsit* upon the same by-law, latitude is allowed; Willcock, 173, pl. 425. But in this country it is said that "it is not necessary to hold to the strictness anciently required:" Keeler *v.* Milledge, 4 Zabr. 142.

[2] Keeler *v.* Milledge, 4 Zabr. (N. J.) 142, 1857; approved, Kip *v.* Patterson, 2 Dutch. 298; City Council *v.* Seeba, 4 Strob. (South Car.) Law, 319; Commonwealth *v.* Bean, That. 85; compare, Fink *v.* Milwaukee, 17 Wis. 26, 1863; See, also, Commonwealth *v.* Bean, 14 Gray, 52. By statute, prosecutions for the violations of the ordinances of Boston may be prosecuted in the name of the commonwealth; and it is decided that in a complaint for such a violation it is not sufficient that it concludes "against the form of the by-laws of the said city," but it must conclude also against the form of the statute: Commonwealth *v.* Gay, 5 Pick. 44, 1827; Commonwealth *v.* Worcester, 3 Pick. 462, 1826. Complaint must be in the name of the treasurer of the city or town, and not in that of the commonwealth, for violation of health ordinances, since the statute of 1849: Chap CCXI. Sec. 7; Commonwealth *v.* Fakey, 5 Cush. 408, 1850. Policemen, marshals, and other officers

§ 348. In an action or proceeding to recover a penalty for the violation of a by-law or ordinance of a corporation, the *declaration or complaint* should state facts which make the liability of the defendant distinctly to appear.[1] And regularly, as before stated, the by-law should be set forth or its substance stated, the breach and the plaintiff's right to sue for the penalty. But where the charter or organic act of the corporation will be judicially noticed, it cannot be necessary to set out, as it has been held to be in England, the authority of the corporation to make the by-law.[2]

§ 349. Where the penalty is given in general terms, it is understood to be to the use of the corporation, and the action or prosecution must be by and in the *name* of the corporation.[3] In England it was the practice, in many cases, to appoint in the by-law the penalty to be sued for in the name of the chamberlain, treasurer, or some other officer of the corporation, and though the power of thus suing for the penalty could not be given to a mere stranger, yet it was not absolutely necessary that the penalty should be given to the corporation, but it

of a municipal corporation, where such a course is not repugnant to the constitution or general law of the state, may be empowered by an ordinance to *arrest* offenders *without warrant*, for breaches of ordinances committed in their presence: Bryan *v.* Bates, 15 Ill. 87; Main *v.* McCarty, 15 Ill. 442; State *v.* Lafferty, 5 Harring. (Del.) 491. Requisites of *warrants* for the violation of municipal ordinances: White *v.* Washington, 2 Cranch Cir. C. 337. Other cases: *Ib.* 356; *Ib.* 459; 4 *ib.* 103; *Ib.* 582. Sufficiency of *notice* to the accused under special charter provisions: 4 Zabr. 142, *supra.* Essentials of summary convictions: Commonwealth *v.* Borden, 61 Pa. St. 272.

[1] 1 Saund. Pl. & Ev. 324; Comyn Dig. Tit. Pleader (2 W. 11); Feltmakers *v.* Davis, 1 Bos. & Pul. 98; Piper *v.* Chappell, 14 M. &. W. 623; Case *v.* Mobile, 30 Ala. 538, 1857; Coates *v.* Mayor, 7 Cow. 585, 608, 1827, where the substance of a declaration in debt is given; Charleston *v.* Chur, 2 Bailey (South Car.), 164; Krickle *v.* Commonwealth, 1 B. Mon. 361, 1841. Pleader need not negative exception in a proviso to the enacting clause of an ordinance or in a subsequent section, this being a matter of defence: Lynch *v.* People, 16 Mich. 472, 1868. The conviction must be for the same offence for which the defendant is prosecuted: Columbus *v.* Arnold, 30 Geo. 517.

[2] Norris *v.* Staps, Hob. 211.

[3] Bodwic *v.* Fennell, 1 Wils. 233; Vintner's Co. *v.* Passey, 1 Burr. 235 Glover, 313; 2 Kyd, 157; Graves *v.* Colby, 9 Ad. & El. 356; Williamson *v.* Commonwealth, 4 B. Mon, 146, 151, 1843. *Ante*, Chap. VIII. p. 160, *et seq.*

might be given to the informer.[1] Whenever the mode of enforcing obedience to a by-law is prescribed by such by-law, that mode must be strictly pursued, and the plaintiff (where the rules of common law pleading prevail) must be the party to whom the penalty is given. Where it is given to the chamberlain for the use of the corporation, the action must be in the name of the chamberlain, and not in that of the corporation. And when the chamberlain may sue, he need not set out his election or appointment, but may aver generally that he is chamberlain, and must set forth his right to sue and to recover.[2] Unless the ordinance show that it was intended that no action for a penalty should lie without a previous demand, it is not necessary to aver one.[3] Nor is it necessary to aver that the defendant had notice of the ordinance, for this is conclusively presumed with respect to all on whom it is binding.[4]

§ 350. *Mode of Procedure, Defences, Evidence, &c.*— In prosecutions to enforce ordinances, the *ordinary rules of evidence* apply, except so far as specially modified by statute; and it is not competent for a municipal corporation, without express authority, to make or alter the rules of evidence or of law.[5] It is, however, competent for a city to provide by general ordinance, after suit commenced to recover a penalty for acting without a license, that the granting of a license, though by its terms it takes effect from a day previous to the commission of

[1] Glover, 313, 314, 315; Feltmakers *v.* Davis, 1 Bos. & P. 101; Bodwic *v.* Fennell, 1 Wils. 233; Tottendell *v.* Glazby, 2 Wils. 266; Hesketh *v.* Braddock, 3 Burr. 1848; Wood *v.* Searl, Bridg. 141; Graves *v.* Colby, 9 Ad. & El. 356.

[2] Harris *v.* Wakeman, Say. 255; Exon *v.* Starre, 2 Show. 159. Under constituent act, town treasurer held entitled to sue in his own name for penalties: Watts *v.* Scott, 1 Dev. (North Car.) 291; Commonwealth *v.* Fakey, 5 Cush. 408, 1850.

[3] Butchers *v.* Bullock, 3 Bos. & P. 434, 437.

[4] London *v.* Barnardston, 1 Lev. 16; James *v.* Putney, Cro. Car. 498.

[5] City Council *v.* Dunn, 1 McCord (South Car.), 333; Fitch *v.* Pinckard, 4 Scam. (Ill.) 78. The defendant's admission of a violation of an ordinance is competent evidence: Columbia *v.* Harrison, 2 Const. R. (South Car.) 213, 1818.

the offence, shall not (as might otherwise be the case) *release* or *waive the penalty*.[1]

§ 351. In proceedings to enforce ordinances, the *illegality* of the *corporate organization* cannot be shown to defeat a recovery; in such a collateral proceeding, evidence that the corporation is acting as such is all that is required.[2]

§ 352. The legislature may ratify ordinances not otherwise binding; and offenders should thereafter be prosecuted under the *ordinances*, and not under the validating act.[3]

§ 353. In prosecutions or actions to enforce ordinances, or in considering the question of their validity, courts will give them a *reasonable construction*, and will incline to sustain rather than to overthrow them, and especially is this so where the question depends upon their being reasonable or otherwise. Thus if by one construction an ordinance will be valid, and by another void, the courts will, if possible, adopt the former. But an ordinance which transcends the power vested in the body which passed it is void, and may be taken advantage of by plea or answer to an action to recover the penalty or other proceedings to enforce it.[4] Its validity may also be tested in proper cases by suits against the corporation or its officers for

[1] City Council *v.* Smidt, 11 Rich. (South Car.) Law, 343; City Council *v.* Corlies, 2 Bailey (South Car.), 189. Commented on by *O'Neall*, J., in City Council *v.* Feckman, 3 Rich. (South Car.) Law, 385. And see case last cited as to other circumstances, in which it was held that a prior penalty was not waived by a subsequent acceptance of the amount of a license for a year.

[2] Hamilton *v.* Carthage, 24 Ill. 22; Mendota *v.* Thompson, 20 Ill. 197; Coles County *v.* Allison, 23 Ill. 437; Decorah *v.* Gillis, 10 Iowa, 234; Kettering *v.* Jacksonville, 50 Ill. 39; Tisdale *v.* Minonk, 46 Ill. 9, 1867.

[3] Truchelut *v.* City Council, 1 Nott & McC. (South Car.) 227, 1818. *Ante*, Chap. IV. p. 92, Sec. 46, and note 2.

[4] Commonwealth *v.* Robertson, 5 Cush. 438, 442, 1850; Vintners *v.* Passey, 1 Burr. 239; Poulters Co. *v.* Phillips, 6 Bing. (N. C.) 314, 323; Tailors of Ipswich, 11 Rep. 54, *a*; Norris *v.* Staps, Hob. 211; Tobacco, &c. Co. *v.* Woodroffe, 7 B. & C. 838; Moir *v.* Munday, Sayer, 181, 185; Rounds *v.* Mumford, 2 Rh. Is. 154, 1852. Where the legislature has conferred full and exclusive jurisdiction to a municipal corporation over a certain subject, the acts of the corporation will be supported by every fair intendment and presumption:

acts done under it,[1] or by a return to a *mandamus* where the party justifies his refusal to comply with the writ, on the ground that the ordinance is invalid,[2] or, as elsewhere shown, by bill in chancery to enjoin proceedings thereunder.

§ 354. If *part of a by-law be void*, another essential and connected part of the same by-law is also void.[3] But it must be essential and connected to have this effect. Thus, if an ordinance, or even the same section of an ordinance, contains two separate prohibitions relating to different acts, with distinct penalties for each, one of which is valid and the other void, the ordinance may be enforced as to that portion of it which is valid.[4]

Baltimore *v.* Clunet, 23 Md. 449, 1865. In view of the inartificial character of town by-laws, they are especially entitled to a reasonable construction: Whitlock *v.* West, 26 Conn. 406; Willc. Mun. Corp. 159, pl. 382. By-laws with penalties are not properly penal statutes. The penalty is in the nature of liquidated damages, established as such in lieu of damages which a court would be authorized to assess. Therefore the strict rules by which the validity of penal statutes are to be tested are not to be applied to the by-laws or ordinances of municipal corporations. It is well remarked, that "the by-laws of very few of these corporations could stand such a test. They should receive a reasonable construction, and their terms must not be strictly scrutinized for the purpose of making them void:" *Per Eustis*, C. J., Municipality *v.* Cutting, 4 La. An. 335; Merraim *v.* New Orleans, 14 *ib.* 318; S. P. Loze *v.* Mayor, &c. 2 La. 427. If, however, the ordinance is, in its nature, highly penal, it will be construed strictly, and it must clearly embrace the offence charged: Krickle *v.* Commonwealth, 1 B. Mon. 361, 1841.

[1] Moir *v.* Munday, Sayer, 181, 185. See protective provisions to corporate officers and agents in Municipal Corporations Act, 5 and 6 Will. IV. Chap. LXXVI. Secs. 132, 133.

[2] Rex *v.* Harrison, 3 Burr. 1322; Grant on Corp. 89. An ordinance may be void for uncertainty in its provisions, as, for example, one which alters street grades, without referring to any plan or establishing new grades: Kearney *v.* Andrews, 2 Stock. (N. J.) 70.

[3] Austin *v.* Murray, 16 Pick. 121, 126, 1834; Com. Dig. By-law, Chap. VII.; Rex *v.* The Company, &c. 8 Term R. 356. See Commonwealth *v.* Stodder, 2 Cush. 562, 1848; Fisher *v.* McGirr, 1 Gray, 1; Warren *v.* Mayor, &c. 2 Gray, 84; Commonwealth *v.* Hitchings, 5 Gray, 482.

[4] Commonwealth *v.* Dow, 382, 1845; Amesbury *v.* Insurance Company, 6 Gray, 596; Shelton *v.* Mayor of Mobile, &c. (market ordinance) 30 Ala. 540, 1857; Rogers *v.* Jones, 1 Wend. 237; Thomas *v.* Mount Vernon, 9 Ohio, 290; 1 Stra. 469; Sir T. Raym. 288, 294; Sayer, 256; 1 B. & Ad. 95; 7 Term R. 549. "If a by-law be entire, each part having a general influence over

§ 355. When not specially regulated by charter or statute, the *proof of ordinances* must be by the production of the originals or the books in which they are registered, as these are the primary evidence.[1] Printed copies, or authenticated copies, are often made competent evidence by the legislature.

the rest, and one part of it be void, the entire by-law is void:" Willcock on Corp. 160, pl. 384; approved, Municipality *v.* Morgan, 1 La. An. 111, 116, 1846. "But if a by-law consist of several distinct and independent parts, although one or more of them may be void, the rest are equally valid, as though the void clauses had been omitted:" Willcock, 161, pl. 389; Fazakerly *v.* Willshire, 11 Mod. 353; Lee *v.* Walis, 1 Kenyon, 295. In a leading case, Rex *v.* The Co. of Fishermen, 8 Term R. 356, Lord Kenyon said: "With regard to the form of the by-law indeed, though a by-law may be good in part and bad in part, yet it can be so only when the two parts are entire and distinct from each other." Approved, Municipality *v.* Morgan, 1 La. An. 111, 116, 1846. It is stated in Grant on Corporations, 88, that it is "now fully settled that a by-law that is void in part is void wholly; *e. g.* if the penalty be unreasonable the rest of the by-law is vitiated thereby, and becomes wholly inoperative and null:" Citing Com. Dig. By-Law, Chap. VII.; Colchester *v.* Godwin, Carter, 121; Ellwood *v.* Bullock, 6 Queen's B. 383; Clarke *v.* Tuckett, 2 Vent. 182; Rex *v.* Atwood, 4 B. & Ad. 481. But the rule in the text is well sustained, and is reasonable; and it is not true that the void part of a by-law will make null complete and independent parts of the same by-law which would otherwise be good.

[1] Lumbard *v.* Aldrich, 8 N. H. 31; Stevens *v.* Chicago, 48 Ill. 498; Moore *v.* Newfield, 4 Greenl. (Me.) 44; Hallowell Bank *v.* Hamlin, 14 Mass. 178; Case of Thetford, 12 Vin. Abr. 90. See chapter on Corporate Records and Documents, *ante*. Proof may be made by the clerk that he posted up copies of an ordinance appearing on the records, without producing such copies or accounting for their absence: Teft *v.* Size, 5 Gilm. (Ill.) 432. As to promulgation and publication of ordinance: Charleston *v.* Chur, 2 Bailey (South Car.), 164; Kittering *v.* Jacksonville, 50 Ill. 39. *Supra*, Secs. 265–269.

CHAPTER XIII.

Municipal Courts.

Municipal Courts in England and at Common Law.

§ 356. A municipal corporation may, at common law, enjoy the franchise of holding a court; and corporation or municipal courts, which were local or inferior jurisdictions, were not uncommon.[1] They were treated as the tribunals of the corporation, but since courts of justice are for the public benefit, words in a charter permitting the corporation to hold a court are imperative;[2] and the right cannot be lost by non-user; and therefore the mere disuse, for two hundred years, of a court granted to a corporation by charter, is no answer to a rule for a *mandamus* commanding them to hold it, though it was alleged that there were no sufficient funds for the purpose.[3]

The common law doctrine respecting municipal courts was settled to be that the municipal corporation could bring no action therein against a stranger where the effect would be to benefit the corporation or increase its funds, for that would be to make the corporation itself both judge and party, which an inflexible and fundamental maxim of the common law prohibited, and the same principle was considered to operate to disqualify corporators to sit as jurors in such cases; but this objection did not apply when both parties were corporators.[4]

The English Municipal Corporation Act of 1835 provides for the establishment of *borough courts*, defines their jurisdiction and powers, makes burgesses or citizens competent jurors, contains an express provision that no witness or magistrate

[1] 1 Inst. 114; 4 *ib.* 87, 224; Cro. Jac. 313; Haddock's Case, T. Raym. 435.

[2] Rex *v.* Mayor, &c. of Hastings, 5 B. & Ald. 592; Grant on Corp. 34.

[3] Regina *v.* Mayor, &c. of Wells, 4 Dowl. P. C. 562.

[4] Hesketh *v.* Braddock, 3 Burr. 1856–1868; Grant on Corp. 194; London *v.* Wood, 12 Mod. 674; 1 Salk. 398; Bosworth *v.* Budgen, 7 Mod. 461; Rex *v.* Rogers, 2 Ld. Raym. 778; Willc. on Corp. 157, 165.

shall be incompetent or disqualified by reason of his being liable to contribute to the fund of the corporation, and regulates in general the proceedings therein for violations of by-laws or ordinances, and the collection and enforcement of penalties.[1]

It may, however, be observed that the power to make by-laws is limited, and does not extend to acts criminal in their nature, and which are punishable by criminal statutes in force throughout the municipality.

American Corporation Courts — Constitutional Provisions.

§ 357. In this country it is usual to provide in the charter or organic act of a municipal corporation for a local or special tribunal, called by different names, such as the mayor's court, recorder's court, city court, police court, and the like; and which is invested with jurisdiction over complaints and prosecutions for the violation of the ordinances of the corporation, and often, for public convenience, with special civil and limited criminal jurisdiction under the laws of the state.

It is competent for the legislature to provide for the establishment of these inferior courts, and to invest them with such measure of power and jurisdiction as may be deemed expedient, if no provision of the constitution of the particular state be infringed.[2]

[1] 5 and 6 Will. IV. Chap. LXXVI. Secs, 90, 91–118–134, 1835.

[2] State *v.* Mayor of Charleston, 14 Rich. (So. Car.), Law, 480; State *v.* Helfrid, 2 Nott & McCord, 233, 1820. Full discussien of legislative power to create *inferior courts*, and define jurisdiction: *Ib.;* Gray *v.* The State, 2 Harring. (Del.) 76, 1835. Mayor's court an *inferior* court within meaning of state constitution: *Ib.;* Egleston *v.* City Council, 1 Const. (So. Car.) R. 45, 1818. As to official character of city recorder: *Ib.;* Schroder *v.* City Council, 2 Const. R. 726. S. C. 3 Brev. 533; Tesh *v.* Commonwealth, 4 Dana, 522; Nugent *v.* The State, 18 Ala. 521, 1821. Holding the city court of Mobile, which is invested with criminal jurisdiction, and from whose judgment an appeal lies, to be constitutional, and defining meaning of *inferior court: Ib.;* New Orleans *v.* Costello, 14 La. An. 37; Myers *v.* People, 26 Ill. 173; Davis *v.* Woolnough, 9 Iowa, 104; People *v.* Wilson, 15 Ill. 389; State *v.* Maynard, 14 Ill. 420; Beesman *v.* Peoria, 16 Ill. 484; Van Swartow *v.* Commonwealth, 24 Pa. St. 131, 1854; Tierney *v.* Dodge, 9 Minn. 166; Burns *v.* La Grange, 17 Texas, 415, 1856; *Ex parte* Slattery, 3 Ark. 434; *ib.* 561; Graham *v.* State, 1 Pike (Ark.), 171; Floyd *v.* Commissioners, 14 Geo. 354, 1853; State *v.* Guttierrez, 15 La. An. 190; Muscatine *v.* Steck, 7 Iowa, 505. The superior

§ 358. We have elsewhere shown that the courts have uniformly held that it was competent for the state legislatures to create municipal corporations with powers of local government, and to authorize them to adopt ordinances or by-laws with appropriate penalties for their violation. The power to

court of the city of San Francisco is constitutional: Seale *v.* Mitchell, 5 Cal. 403; Vassault *v.* Austin, 36 Cal. 691; Hickman *v.* O'Neal, 10 Cal. 294. The constitution of California, as amended in 1862, authorized the legislature to establish "recorder's or other inferior courts in any incorporated city or town;" and it was held, in view of the prior decisions in the state just cited, that the municipal criminal court of the city and county of San Francisco was an *inferior* court, and constitutional: Stratman, *Ex parte*, 39 Cal. 517, 1870.

Under a *constitutional provision* declaring that "the *judicial power* shall be vested in a Supreme Court, in district courts, and in justices of the peace," an act conferring judicial powers on the mayor of a city was considered void, and it was held that for violations of its ordinances the corporation should resort to the judicial tribunals organized under the constitution: Lafon *v.* Dufrocq, 9 La. An. 350, 1854. But see The State *v.* Young, 3 Kansas, 445, 1866, where a provision in an organic act that the judicial power shall be vested exclusively in a Supreme Court, district, probate, and justice courts, was held not to prohibit the legislature from establishing municipal courts for the enforcement of municipal regulations and ordinances. And this seems to be the correct view: Shafer *v.* Mumma, 17 Md. 331. In Hutchins *v.* Scott, 4 Halst. (N. J.) 218, 1827, the objection was made that the legislature could not constitutionally confer the powers of *justices of the peace on the mayor, recorder, or aldermen of a city* or borough, the argument being that since the constitution provided for the appointment of justices of the peace only, and not for corporate officers, officers exercising the authority and powers of a justice of the peace should be appointed as such; but the objection was not sustained. In Illinois, mayors of cities cannot, it is held, be constitutionally invested with judicial power: The State, &c; *v.* Maynard, 14 Ill. 420; Beesman *v.* Peoria, 16 Ill. 484. By the general law of Indiana of 1857, for the incorporation of cities, mayors, in addition to their duties proper, have, "within the limits of cities, the jurisdiction and powers of a justice of the peace in all matters, civil and criminal, arising under the laws of the state, and for crimes and misdemeanors a jurisdiction co-extensive with the county." The constitution of the same state (Art. VII. Sec. 16) declared that "no person elected to any *judicial office* shall, during the term, be eligible to any office of trust or profit under the state, other than a judicial office." One Wallace was elected mayor of Indianapolis, add within his term he resigned and received a majority of votes for sheriff of the county. It was held by the Supreme Court of Indiana (Waldo *v.* Wallace, 12 Ind. 569, 1859; Gulick *v.* New, 14 *ib.* 93), that Wallace was a "judicial officer," and therefore ineligible to the office of sheriff; that the voters of the county were chargeable with *notice* of his ineligibility; that votes cast for him were therefore ineffectual, and that his com-

do this includes, by fair construction, the power to authorize violations of ordinances (where the acts are not criminal in their nature) to be tried and determined in a summary manner, by a local or corporation tribunal.

The distinction between statute law and municipal by-laws has been pointed out, and the subject of concurrent prohibitions of the same act by the general law and by the local ordinances of a municipality treated, in the chapter on Ordinances. The distinction is there drawn, and is to be observed between acts not essentially criminal, relating to municipal police, and those intrinsically criminal, and which are made punishable by the general laws of the state. The pecuniary penalties which are annexed to violations of the former class, the legislature may, we think, authorize the corporation to enforce in its own

petitor, having received the greatest number of *legal* votes, though not a majority of the ballots, was duly elected. Notwithstanding the great consideration which these cases received, I venture, with great deference, to state that it is by no means clear to my mind that the mayor was a "judicial officer" within the meaning of the constitution. See, as bearing upon the above decision, and illustrative of the nature of the office of mayor Morrison *v.* McDonald, 21 Maine, 550, 1842; State *v.* Maynard, 14 Ill. 419, 1853; Commonwealth *v.* Dallas, 4 Dallas, 229; S. C. more fully, 3 Yeates, 300, 1801; State *v.* Wilmington, 3 Harring. (Del.) 294, 1839. Authority of a mayor under a statute investing him with the powers of a justice of the peace: State *v.* Perkins, 4 Zabr. (N. J.) 409; 1 Harr. (N. J.) 237. See Baton Rouge *v.* Deering, 15 La. An. 208. A *constitutional* provision as to eligibility "to the *office of judge* of any court of the state," &c., and requiring a two years residence "in the division, circuit, or county," was considered to have no reference to the office of *recorder* of a city: The People *v.* Wilson 15 Ill. 389.

The constitution of Nevada provided that "the legislature may also establish courts for *municipal purposes only*, in incorporated cities and towns," and it was held that an act authorizing the city recorder to exercise the duties of committing magistrates in respect to offences against the public laws of the state was in conflict with the constitution: Meagher *v.* County, 5 Nev. 244, 1869. The constitution of Maryland contains a provision that "the *judicial power* of the state shall be vested in a Court of Appeals, in circuit courts, in such courts for the city of Baltimore as may be hereafter prescribed, and in justices of the peace," and it was held that the legislature might authorize municipal courts to try and punish disorderly persons and lewd women within the corporate limits, and generally to authorize the corporate authorities to exercise police powers, which were distinguished from the ordinary judiciary powers of the state: Shafer *v.* Mumma, 17 Md. 331, 1861.

name, by civil action, or by complaint, and provision need not necessarily be made that they shall be prosecuted in the name of the people or of the state.[1]

[1] Barter *v.* Commonwealth, 3 Pa. (Pen. & W.) 253; Weeks *v.* Foreman, 1 Harrison (N. J.), 237; Ewbank *v.* Ashley, 36 Ill. 177; Williams *v.* Augusta, 4 Geo. 509; Floyd *v.* Commissioners, 14 Geo. 354; Kip *v.* Patterson, 2 Dutch. (N. J.) 298; Lewistown *v.* Proctor, 23 Ill. 533; State *v.* Jackson, 8 Mich. 110. See State *v.* Stearns, 11 Fost. 106; Goddard, Petitioner, 16 Pick. 504; Fink *v.* Milwaukee, 17 Wis. 26.

The constitution of the state of Iowa contains this provision: "The style of all process shall be 'The State of Iowa,' and all *prosecutions* shall be conducted in the name and by the authority of the same:" Constitution of Iowa, Art. V. Sec. 8. The charter of the city of Davenport, in terms, authorized *prosecutions* for violations of municipal ordinances to be instituted in the name of the city, and it was contended that this portion of the charter was in conflict with the above quoted provision of the constitution. But the Supreme Court, in the case of Davenport *v.* Bird, December term 1871 (not yet reported), held otherwise. It was a prosecution in the name of the city against the defendant for a violation of an ordinance of a police nature, but for which, under the charter, the city was authorized to punish by a limited fine and imprisonment. In giving the opinion of the court, *Miller*, J., says: "Is it necessary, under the constitution, that all prosecutions for violations of municipal police ordinances shall be conducted *in the name and by the authority* of the state of Iowa? Or, in other words, is that clause of the city charter of Davenport, which directs that 'all suits, actions, and prosecutions instituted, commenced, or brought by the corporation shall be instituted, commenced, and prosecuted *in the name of the city of Davenport*,' in conflict with the constitutional provision before referred to? We are of opinion that it is not. This clause of the constitution occurs in Art. V., which treats of the judicial department of the government. This article vests and defines the judicial power of the state, establishes the tenure of office of the judges, and defines the mode of their election; fixes their salary and limits the number of judicial districts; provides for the election of an attorney general, and other matters pertaining to the judicial arm of the state, among which is the clause under consideration. From all this, it seems manifest that the requirement 'that all *prosecutions* shall be conducted in the name of "The State of Iowa"' contemplates such criminal *prosecutions* as shall be instituted and prosecuted before the tribunals which are provided for in that article of the constitution under the statutes of the state. It is fitting and appropriate that prosecutions for violations of the criminal laws of the state should be carried on in the name of the government. But there is no fitness or propriety in requiring the state to be a party to every petty prosecution under the police regulations of a municipal corporation. Such a construction of this article of the constitution seems to us unwarranted, and not intended by the framers of the constitution. It was held by the Supreme Court of Pennsylvania that the word *process*, in the 12th section of the 5th article of the constitu-

§ 359. In creating local tribunals, however, and in prescribing their jurisdiction, it is essential that the legislature should keep in view two cardinal considerations: *First.* That these inferior courts will have only such jurisdiction, and can exercise only such powers, as are *expressly* given, or *necessarily implied.* Fair doubts as to the extent of jurisdiction are resolved against the corporation; to this effect are all the authorities. *Second.* Regard should also be had to constitutional provisions intended to secure the liberty and protect the rights of the citizen. The state constitutions contain the substance of the provisions of Magna Charta to the effect that no citizen shall be deprived of life, liberty, or property but by the judgment of his peers or by the law of the land, and also provisions, more or less extensive, securing the right of trial by jury. These and other provisions of the fundamental law cannot be violated in acts of the legislature establishing and fixing the jurisdiction of the corporation court or tribunal.[1]

Citizens Competent to be Local Judges, Jurors, and Witnesses.

§ 360. The maxim of the common law above adverted to, that no one shall be a judge in his own case, has no just application to legislation creating municipal courts, and investing them with jurisdiction to try complaints for breaches of municipal ordinances. The mayor, though a citizen of the corporation, may be clothed with judicial powers of this char-

tion of the state of Pennsylvania, which provides that 'the style of all process shall be the *Commonwealth of Pennsylvania,*' was intended to refer to such writs only as should become necessary to be issued in the course of the exercise of that *judicial power* which is established and provided for in the article of the constitution, and forms exclusively the subject matter of it. On the same principle, we are of opinion that the word 'prosecutions,' in the 8th section of Article V. of our constitution, was intended to refer only to such criminal prosecutions under state laws as should be cognizable by the *judicial power,* which is established and provided for in that article, and that it was not intended to include prosecutions under ordinances of municipal corporations cognizable before local police magistrates."

And the same view is held by the Court of Appeals of Kentucky: Williamson *v.* Commonwealth, 4 B. Mon. 146, 1843. As to mode of enforcement and requisites of complaints, *vide* chapter on Ordinances, Sec. 341.

[1] Zylstra *v.* The Corporation of Charleston, 1 Bay, 382, 1794; People *v.* Slaughter, 2 Doug. (Mich.) 334, 1842.

ter, and the inhabitants, though interested in a minute degree in the recovery, are, or at least may be declared, competent witnesses. In this respect the common law rules have not been adopted and applied by the American courts to our municipal corporations.[1]

Summary Proceedings may, in Certain Cases, be Authorized.

§ 361. Proceedings for the violation of municipal ordinances are frequently summary in their character, and it has been made a question how far statutes or charters authorizing such proceedings are valid, especially where no provision is made for trial by jury. This must depend upon the constitution of the state and the extent to which the power of the legislature is therein restricted. Offences against ordinances properly made in virtue of the implied or incidental power of the corporation, or in the exercise of its legitimate police authority

[1] Thomas *v.* Mount Vernon, 9 Ohio, 290, 1839; Commonwealth *v.* Read, 1 Gray (Mass.), 475; The Mayor *v.* Long, 31 Mo. 369, 1861; Commonwealth *v.* Ryan, 5 Mass. 90; Cooley Const. Lim. 410, 412.

In The City Council *v.* Pepper, 1 Rich. (So. Car.) Law, 364, 1845, the defendant, a non-resident of the city, was prosecuted in the city court, established by act of the legislature, for a violation of a city ordinance. The defendant made the point that as the judge of that court, the sheriff, and jurors were corporators, and therefore interested in the penalty, they were incompetent to try the cause. In holding this objection unsound, the Court of Appeals, after alluding to Hesketh *v.* Braddock, 3 Burr. 1847, relied on by the defendant, remarks: "The statutory authority given to the city court to try all offenders against city ordinances, impliedly declares that, notwithstanding the common law objection, it was right and proper to give it the power to enforce the city laws against all offenders. The interest is too *minute*, too slight, to excite prejudice against a defendant; for the judge, sheriff, and jurors are members of a corporation of many thousand members. What interest of value have they in a fine of twenty dollars? It would put a most eminent calculator to great trouble to ascertain the very minute grain of interest which each of these gentlemen might have. To remove so shadowy and slight an objection, the legislature thought proper to clothe the city court, consisting of its judge, clerk, sheriff, and jurors, with authority to try the defendant, and he cannot now object to it:" *Per O'Neall*, J., City Council *v.* Pepper, 1 Rich. (So. Car.) Law, 364, 1845; City Council *v.* King, 4 McNott (So. Car.), 487; Corwein *v.* Hames, 11 Johns. 76, 1814. The mayor is not disqualified from presiding in the Mayor's Court, before which the proceedings are held, from the fact that he is the owner of a lot on the street sought to be widened: The Mayor *v.* Long, 31 Mo. 369, 1861.

for the preservation of the peace, good order, safety, and health of the place, and which relate to minor acts and matters not embraced in the public criminal statutes of the state, are not usually or properly regarded as *criminal*, and hence need not necessarily be prosecuted by indictment or tried by a jury,[1] An act of the legislature authorizing the arrest of professional thieves and burglars frequenting any railroad depot, &c., in the city of Philadelphia, and their commitment by the mayor, without a trial by jury, is not in conflict with the provision of the constitution of the state, which guarantees "that trial by jury shall be as heretofore, and the right thereof remain inviolate." [2]

[1] Williams *v.* Augusta, 4 Geo. 509, 1848; approved, Floyd *v.* Commissioners, 14 Geo. 358, 1853; Vason *v.* Augusta, 38 Geo. 542, 1868; State *v.* Guttirrez, 15 La. An. 190; Tierney *v.* Dodge, 9 Minn. 166, 186; Byers *v.* Commonwealth, 42 Pa. St. 89; 1 Bish. Cr. Pr. Sec. 758; State *v.* Conlin, 27 Vt. 318. Thus, in New Jersey it is held that legislative authority to municipal courts to punish violations of ordinances by a limited fine and imprisonment, without providing for a trial by jury, is not in conflict with the constitutional provision that "the right of trial by jury shall remain inviolate:" McGear *v.* Woodruff, 33 N. J. Law, 213, 1868; Johnson *v.* Barclay, 1 Harr. (N. J.) 1. *Ante*, Secs. 300, 344, 345.

Treating of this subject, Mr. *Sedgwick* says: "Extensive and summary police powers are constantly exercised in all the states of the Union for the repression of breaches of the peace and petty offences; and these statutes are not supposed to conflict with the constitutional provisions securing to the citizens a trial by jury:" Stat. and Const. Law, 548, 549; Cooley, Const. Lim. 596. In Williams *v.* Augusta, *supra*, proceedings before a city council for violations of its ordinances, although punishable by fine, were considered not to be "*criminal cases*" within the meaning of the constitution of Georgia, vesting the jurisdiction of all *criminal cases* in tribunals other than corporation courts, the court being of opinion that the term "criminal cases," as used in the constitution, had reference to such acts and omissions as are in violation of the *public laws* of the state, and not to violations of local ordinances made for the internal police and government of a city. In the state last named the settled rule is that the same act cannot be twice punished — once by the municipality and once by the state — and the rule is adopted that the municipal power ends where the right to indict under state authority exists, as any other rule would deprive the accused of the right to a jury trial: Jenkins *v.* Thomasville, 35 Geo. 145, 1866; Vason *v.* Augusta, *supra;* Savanna *v.* Hussey, 21 Geo. 80, 1857. So in Michigan: People *v.* Slaughter, 2 Doug. (Mich.) 334, 1842. Otherwise in Kentucky: Williamson *v.* Commonwealth, 4 B. Mon. 146, 1843. *Ante*, Secs. 302, 344.

[2] Byers *v.* Commonwealth, 42 Pa. St. 89. In this case the extent of the right of trial by jury at common law is thoroughly examined in a valuable

§ 362. But where the legislature undertakes to confer upon the courts of the corporation, or where the corporation seeks to give its court summary jurisdiction to *try* persons for acts which are indictable, or are criminal offences, it not unfrequently happens that some provision of the constitution, designed to protect the rights or liberty of the citizen, is violated. Thus, under a constitution declaring "that no freeman shall be put to answer any criminal charge, but by indictment," etc., and "that no freeman shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men in open court, as heretofore used," an act of the legislature which gives to an officer of an incorporated town the power of trying assaults and batteries, or other crimes, is, in the opinion of the Supreme Court of North Carolina, void, because it violates both of these provisions of the constitution.[1]

opinion by *Strong*, J., now one of the justices of the Supreme Court of the United States, and the validity of summary convictions sustained. See chapter on Ordinances, *ante*. The doctrine may be considered as settled in Pennsylvania that municipal corporations are not within the constitutional guaranty of jury trial, and that the right to a trial by jury may be withheld by the legislature from *new offences*, and from *new jurisdictions* created by statute without common law powers, and from proceedings *out of the course of the common law:* Rhines *v.* Clark, 51 Pa. St. 96, 1865, *per Woodward* C. J.; Dunmore's Appeal, 52 Pa. St. 374, 1866; Ewing *v.* Filley, 43 Pa. St. 384, 1862; Van Swartow *v.* Commonwealth, 24 Pa. St. 131, 1854. See Barter *v.* Commonwealth, 3 Pa. (Pen. & W.) 253, 1831. A different view is, to some extent, taken by the Supreme Court of Vermont under the constitution of that state, whose language is, that "when an issue of fact *proper for cognizance* of a jury shall be joined in a court of law, the parties *have* a right to trial by jury which ought to be held sacred." In the opinion of the court, a public corporation, although the liability on the corporation be created by statute, is entitled to a jury trial, and therefore a statute providing for a compulsory and final reference of a case, in its nature one at common law, is void, and the constitution applies to all controversies fit to be tried by a jury, although the particular right was created by statute enacted after the adoption of the constitution: Plimpton *v.* Somerset, 33 Vt. 283, 1860. It would, perhaps, be going too far to say that municipal corporations are not in any case within the constitutional guaranty of a trial by jury, and yet it would not follow that provision might not be made for the trial in a summary way, before municipal courts, of petty or police offences. *Ante*, Chap. IV. *Supra*, Secs. 300–302, 344, 345.

[1] State *v.* Moss, 2 Jones (N. C.), Law, 66, 1854. See Tierney *v.* Dodge, 9 Minn. 166, 1864. The constitution of Louisiana (Art. 103) requires that "prosecutions shall be by indictment or information. The accused shall

§ 363. A similar view was taken in the state of Arkansas, the constitution of which provided that "no man shall be put to answer any criminal charge but by presentment, indictment, or impeachment;" and it was held that the legislature could not confer upon the corporation courts of a city the power to punish an assault and battery — this being a criminal charge —without presentment or indictment; and it was consequently decided that the judgment of conviction of such a court for an assault and battery is *coram non judice*, and constitutes no bar to a prosecution by indictment in the courts of the state for the same offence.[1]

§ 364. The same doctrine was declared in Michigan. The constitution of that state contained a provision that "no person shall be held to answer for a *criminal offence* unless on the presentment of a grand jury, except cases cognizable by justices of the peace," &c.; and, by the statutes of the state, the keeping of a bawdy house was declared to be an offence punishable by fine and imprisonment. Under this state of the law the city of Detroit was empowered by the legislature "to make all such by-laws and ordinances as may be deemed expedient by the common council for effectually preventing and suppressing houses of ill-fame within the limits of the city." It was held that the term "criminal offence" in the constitution included both felonies and misdemeanors, and embraced the offence (which was such both at common law and by the statute of the state) of keeping a house of ill-fame, and therefore an ordinance of the common council prescribing the punishment for

have a speedy trial by an impartial jury of the vicinage." Another article (124) provides that "the mayors, recorders, &c., may be commissioned, and the legislature may vest in them such criminal jurisdiction as may be necessary for the punishment of minor crimes and offences, as the police and good order of the city of New Orleans may require." It was held that Article 103 laid down the general rule, to which Article 124 was an exception, and that under the latter article it was competent for the legislature to provide for the prosecution of minor offences, without indictment or jury trial, in the Recorder's Court:" State *v.* Guttirrez, 15 La. An. 190, 1860.

[1] Rector *v.* State, 6 Ark. (1 Eng.) 187, 1845; Durr *v.* Howard, 6 Ark. 461; Lewis *v.* State, 21 Ark. 211. But it is held in the same state that a corporation court may punish a person for using obscene language in the streets, because such an offence is not declared criminal by any statute of the state: Slattery, *Ex parte*, 3 Ark. 484.

keeping such a house within the city and providing for the trial and conviction of the offenders in the municipal court without *indictment*, was unconstitutional, the judgment of the court resting upon the principle that under the constitutional provision quoted, there could be no summary conviction under an ordinance for *that* which is a criminal offence by the general laws of the state.[1]

§ 365. So, by the constitution of Texas, it is provided that "in all cases in which justices of the peace or inferior tribunals shall have jurisdiction of causes where the penalty is fine and imprisonment (except in cases of contempt), the accused shall have the right of trial by jury," and under this it was held that the mayor's court could not constitutionally be invested with power to try summarily, and without a jury, a person for assault and battery, in violation of the ordinances of the corporation, where the mayor was authorized to impose a fine.[2]

§ 366. In Zylstra *v.* The Corporation of Charleston, it appeared that the organic act of the city gave to the common council power to affix and levy fines for all offences against their by-laws, and there was no limitation of the *amount* of the fines. In this respect the charter was silent. The "Court of Wardens" (the corporation tribunal) had the power expressly given to it to commit for fines and penalties. Under these circumstances the corporation of Charleston passed an ordinance prohibiting the exercise of the trade of candle and soap making within the limits of the city, under a penalty of £100. Zylstra was prosecuted in the Court of Wardens — composed

[1] People *v.* Slaughter, 2 Doug. (Mich.) 334, 1842, note; and see Welch *v.* People, *ib.* 332, 1846. But in Kentucky, the constitution of which provides that "no person shall, for any indictable offence, be proceeded against criminally by information," and that "all prosecutions shall be carried on in the name and by the authority of the commonwealth," the legislature may authorize a city corporation to proceed in its name against offenders for violating its ordinances, and punish them by fine, although the offence, as in the case before the court (an assault and battery), is indictable under the laws of the state. The court regarded the proceeding in the name of the corporation as of a *quasi* civil or penal nature, and not as criminal: Williamson *v.* Commonwealth, 4 B. Mon. 146, 1843.

[2] Burns *v.* La Grange, 17 Texas, 415, 1856; S. P. Smith *v.* San Antonio, *ib.* 643.

of members of the city council — for a violation of this by-law, and fined by this court £100. On his motion to obtain a *prohibition* it was held, under the constitution of that state, that the proceedings of the Court of Wardens were void, not being according to the *lex terræ* recognized by Magna Charta, and expressly adopted by the state constitution. And the judges who expressed themselves on that point were of opinion, under the state constitution, that that tribunal could not be invested with a jurisdiction greater than that exercised by justices of the peace, unless there was provision made for securing a trial by jury, which in the instance before the court had not been done.[1]

[1] Zylstra *v.* Charleston, 1 Bay, 382, 1794.

In holding that the charter of the city of Lancaster did not confer upon the councils the right to vest in the mayor and aldermen jurisdiction to convict summarily, and imprison in default of payment of the penalty affixed to an ordinance, *Gibson*, C. J., remarked: "Now, if the charter even purported to confer a power to imprison on summary conviction [for a misdemeanor] and without appeal to a jury, it would be so far unconstitutional and void:" Barter *v.* Commonwealth, 3 Pa. (Pen. & W.) 253, 1831.

A statute providing for *summary* conviction for a new offence before inferior jurisdictions, without a jury, does not violate the provision of the constitution that "trial by jury shall be *as heretofore*, and the right thereof *remain* inviolate:" Van Swartow *v.* Commonwealth, 24 Pa. St. 131, 1854. See, also, Boring *v.* Williams, 17 Ala. 510; Tines *v.* The State, 26 Ala. 165; *In re* Powers, 25 Vt. 261; Murphy *v.* People, 2 Cow. 815; Shirley *v.* Lunenburg, 11 Mass. 379; Rhines *v.* Clark, 51 Pa. St. 96. *Supra*, Sec. 361.

As to the right, under particular constitutional and statutory provisions, to a *jury* trial, for violations of municipal by-laws: Thomas *v.* Ashland, 12 Ohio St. 124; Work *v.* State, 2 *ib.* 296; Gray *v.* State, 2 Harring. (Del.) 76, 1836; Low *v.* Commissioners of Pilotage, R. M. Charlt. (Geo.) 302; Green *v.* Mayor, *ib.* 368, 371; Williams *v.* Augusta, 4 Geo. 509; approved, Floyd *v.* Commissioners, 14 Geo. 354, 1853; State *v.* Guttirrez, 15 La. An. 190.

Jurisdiction of mayor's, recorder's, and police courts under statutes or special charters: Commonwealth *v.* Pindar, 11 Met. 539; Commonwealth *v.* Roark, 8 Cush. 210; Same *v.* Emery, 11 Cush. 406; Elder *v.* Dwight Manufacturing Company, 4 Gray, 201; State *v.* Ricker, 32 N. H. 179; Myers *v.* People, 26 Ill. 173; Rice *v.* State, 3 Kansas, 141; State *v.* Young, 3 Kansas, 445; Malone *v.* Murphy, 2 Kansas, 250; Gray *v.* State, 2 Harring. (Del.) 76; Hutchins *v.* Scott, 4 Halst. (N. J.) 218; Cincinnati *v.* Gwynne, 10 Ohio, 192; 14 *ib.* 250, 603; Markle *v.* Akron, 14 Ohio, 586; Weeks *v.* Foreman, 1 Harris. (N. J.), 237; Truchelut *v.* City Council, 1 Nott & McC. 227; Thornton *v.* Smith, 1 Washing. (Va.) R. 106; McMullen *v.* City Council, 1 Bay (South Car.), 46; Zylstra *v.* Charleston, *ib.* 382; Willis *v.* Booneville, 28 Mo. 543; Fayette *v.*

Sufficient of the Right of a Jury Trial is Given by Appeal.

§ 367. It is, however, the prevailing doctrine, that although the charge or matter in the municipal or local courts be one, in respect of which the party is entitled to a trial by jury, yet if by an appeal, clogged with no unreasonable restrictions, he can have such a trial as a matter of right in the appellate court, this is sufficient, and his constitutional right to a jury trial is not invaded by the summary proceeding in the first instance.[1]

Review of Proceedings by Superior Tribunals.

§ 368. With respect to inferior jurisdictions, the right to review their proceedings by the superior tribunals cannot be taken away unless the intention of the legislature to this effect is expressed with unequivocal clearness. The authorities cited in the note will show the great length to which the courts go in preserving the right to review the proceedings of subordinate tribunals, administered frequently by men without professional or judicial knowledge or experience. A declaration by the statute concerning an inferior tribunal, that its proceedings "shall be *final* and *conclusive*," or "*without appeal*," etc., will not deprive a party of the right of review by *certiorari*, error, or the proper proceeding.[2] But where it is declared with respect to a court of general and superior jurisdiction, as of the

Shafroth, 25 Mo. 445; Sill *v.* Corning, 15 N. Y. 297; Goodrich *v.* Brown, 30 Iowa, 291, 1870.

Extent of jurisdiction *territorially*: State *v.* Clegg, 27 Conn. 593; Covill *v.* Phy (process), 26 Ill. 432; State *v.* McArthur, 13 Wis. 383.

[1] Stewart *v.* Mayor, 7 Md. 501; Morford *v.* Barnes, 8 Yerger (Tenn.), 444; McDonald *v.* Schell, 6 Serg. & Rawle, 240; Beers *v.* Beers, 4 Conn. 535; Jones *v.* Robbins, 8 Gray, 329; Dorgan *v.* Boston, 12 Allen, 223; Sedg. St. and Const. Law, 549; Cooley, Const. Lim. 410.

[2] Rex *v.* Commissioners, 2 Keeble, 43; Rex *v.* Morely, 2 Burr. 1040; Lawton *v.* Commissioners, 2 Caines (N. Y.), 179, 181; Starr *v.* Trustees, 6 Wend. 564; People *v.* Mayor, 2 Hill (N. Y.), 9; Tierney *v.* Dodge, 9 Minn. 166; *Ex parte* Heath, 3 Hill (N. Y.), 42, 52, and cases cited and reviewed by *Cowen*, J.

A kindred subject is treated in the chapter on Municipal Officers—"Special tribunal to determine election contests for municipal offices," *ante*, Sec. 139, and it is there shown that the ordinary constitutional provision that the judicial power shall be vested in certain courts does not disable the

Supreme Court of New York, that its action (for example, in confirming appraisements for opening streets, or under a railroad act) "shall *be final and conclusive* upon the parties

legislature from providing that the council of municipal corporations may finally determine the validity of the election of corporation officers: Mayor, &c. *v.* Morgan, 7 Martin (La.), 1; 9 *ib.* (N. S.) 381, 1828; State *v.* Fitzgerald, 44 Mo. 425, 1869; Ewing *v.* Filley, 43 Pa. St. 384; State *v.* Johnson, 17 Ark. 407. But the supervisory jurisdiction of the superior courts will not be held to be taken away by mere negative words: Grier *v.* Shackleford, Const. Rep. 642; State *v.* Fitzgerald, *supra*; Commonwealth *v.* McCloskey, 2 Rawle, 369; *Ex parte* Strahl, 16 Iowa, 369; State *v.* Funck, 17 Iowa, 365; Bateman *v.* Megowan, 1 Met. (Ky.) 533; Wammacks *v.* Holloway, 2 Ala. 31; Hummer *v.* Hummer, 3 G. Greene, 42; State *v.* Marlow, 15 Ohio St. 114; Attorney General *v.* Corporation of Poole, 4 Mylne & Cr. 17; Attorney General *v.* Aspinwall, *ib.* 613; Parr *v.* Attorney General, 8 Cl. & F. 409; Taylor *v.* Americus, 39 Geo. 59. *Post*, Chaps. XX. XXI. XXII.

The Supreme Court of Michigan, in reviewing on *certiorari*, the legality of a conviction of the defendant in the recorder's court on a complaint for violating a municipal ordinance, speaking of the extent of the *revisory power of the superior tribunals*, and the nature and purposes of the municipal tribunals, says: "The power of reviewing upon *certiorari* judicial proceedings of inferior tribunals and bodies not according to the course of the common law, has been long exercised in England, as well as in this country. The power has been jealously maintained, and has been deemed necessary to prevent oppression. There are certain classes of questions which, by common understanding from time immemorial, belong to the course of judicial inquiry under the laws of the land. The common law, and the various charters and bills of rights, recognized and assured the right to such an inquiry. And the constitution, in apportioning the judicial power, as well as in affirming the immunity of life, liberty, and property, has always been understood to guarantee to each citizen the right to have his title to property, and other legal privileges, determined by the general tribunals of the state. These municipal courts, so far as they act under city by-laws, are not designed to decide between man and man, or to administer general laws. They are ordained to prevent disorder in matters of local convenience, and to regulate the use of public and *quasi* public easements, so as to prevent confusion. If in exercising this power they can incidentally decide upon the rights of private property so as to determine its enjoyment without review, there would seem to be a practical annihilation of the right to resort to the general tribunals and the common law:" *Per Campbell*, J., Jackson *v.* People, 9 Mich. 111, 117, 1860. Further, see Chap. XXII. *post.*

An *appeal* from inferior tribunals does not exist unless plainly given: People *v.* Police Justice, 7 Mich. 456; Conboy *v.* Iowa City, 2 Iowa, 90; Muscatine *v.* Steck, 7 Iowa, 505; Dubuque *v.* Rebman, 1 Iowa, 444. *Certiorari*, on the other hand, will lie unless plainly denied, or other specific remedy be given: Cunningham *v.* Squires, 2 West Va. 422, 1865. *Post*, Sec. 476, and chapter on Remedies Against Illegal Corporate Acts, *post.*

interested and upon all other persons," the right of appeal, which would otherwise exist from the decision of such court to a still higher tribunal, as to the Court of Appeals, is destroyed.[1] A charter provision to the effect that appeals and writs of error from judgments of the mayor, in cases arising under the charter, should only be allowed in cases where the fine was over five dollars, was considered as evincing the legislative intention that in cases where the fine was under that sum the judgment should be final, and hence a writ of prohibition will not lie to restrain its collection, nor can it be reviewed on *certiorari*.[2]

§ 369. In Virginia it is decided that in a proceeding before the mayor or a justice to impose a penalty on a party for obstructing a street, the mayor or justice cannot, if the defendant *bona fide* claims title to the land claimed as a street, inquire into the validity of the claim, the court holding that by the principles of the common law (which are not changed by the statutes), a *bona fide* assertion of title to property or to an incorporeal hereditament, or real franchise, ousted the jurisdiction of these inferior magistrates or tribunals.[3]

[1] Matter of Canal and Walker streets, 12 N. Y. (2 Kern.) 406, 1855; New York, &c. Railroad Company *v.* Marvin, 11 *ib.* (1 Kern.) 276.

[2] Wertheimer *v.* Mayor, &c., 29 Mo. 254, 1860.

[3] Warwick *v.* Mayo, 15 Gratt. (Va.) 528, 1860. To the same effect, see Jackson *v.* People, 9 Mich. 111, 1860; Grand Rapids *v.* Hughes, 15 Mich. 54, 1866. See chapter on Streets. What record of conviction before corporation officers or courts should show: Keeler *v.* Milledge, 4 Zabr. (N. J.) 142; Muscatine *v.* Steck, 7 Iowa, 505. See Chap. XXII. *post.*

CHAPTER XIV.

Contracts.

§ 370. The mode of enforcing the contracts of municipal corporations will be considered hereafter.[1] In this chapter we will treat, in the order below indicated, of the power of such corporations to make contracts of different kinds, the mode of exercising the power, and the effect of transcending it:

1. Extent of Power to Contract, and How Conferred — Secs. 371, 372.

2. Mode of Exercising the Power — Sec. 373.

3. Seal Not Necessary Unless Required — May be Concluded by Vote or Ordinance — Secs. 374, 375.

4. When Bound by Contracts Made by Agents — Mode of Execution — Secs. 376–380.

5. Contracts Beyond Corporate Powers Void — *Ultra Vires* a defence — Secs. 381, 382.

6. Implied Contracts — When Deducible — Secs 383, 384.

7. Ratification of Unauthorized Contract — Secs. 385–387.

8. Provision Requiring Letting to Lowest Bidder — Secs. 388–392.

9. Contract of Suretyship — Sec. 393.

10. Rights and Liabilities as Respects Authorized Contracts — Illustrations — Cases Mentioned. Power to Settle Disputed Claims — to Give Extra Compensation — to Employ Attorneys — Secs. 394–399.

11. Contracts for Public Works — Rights of Contractors — Secs. 400–403.

12. Same — Corporate Control Under Stipulation — Secs. 400–403.

13. Evidences of Indebtedness — Negotiable Bonds — Secs. 404, 405.

[1] See *post*, Chaps. XX. XXII. XXIII. Legislative power over contracts made by municipal corporations. See Chap. IV. *ante*.

14. Ordinary Warrants or Orders — Their Legal Nature — Secs. 406, 407.

15. Liability of Indorsers Thereof — Sec. 408.

16. Payment and Cancellation of Orders and Warrants — Sec. 409.

17. Rights and Remedies of Holders Thereof — Secs. 410, 411.

18. Defences Thereto — *Ultra Vires* — Fraud — Want of Consideration — Sec. 412.

19. Orders Payable out of a Particular Fund — Sec. 413.

20. Interest on Corporate Indebtedness — Sec. 414.

21. Railroad Aid Bonds — Course of Decision in U. S. Supreme Court — Secs. 415, 416.

22. Leading Cases in National Supreme Court on the Subject Noticed — Secs. 417–422.

23. Decisions in State Courts Referred to — Conclusion Stated — Secs. 423–426.

§ 371. *Extent of Power, and How Conferred.* — In determining *the extent of the power* of a municipal corporation to make contracts, and in ascertaining *the mode* in which the power is to be exercised, the importance of a careful study of the charter or incorporating act, and the general legislation of the state on the subject, if there be any, cannot be too strongly emphasized. Where there are express provisions on the subject, these will, of course, measure, as far as they extend, the authority of the corporation. The power to make contracts, and sue and be sued thereon, is usually conferred, in general terms, in the incorporating act. But where the power is conferred in this manner it is not to be construed as authorizing the making of contracts of all descriptions, but only such as are necessary and usual, fit and proper, to enable the corporation to secure or carry into effect the purposes for which it was created; and the extent of the power will depend upon the other provisions of the charter defining the matters in respect of which the corporation is authorized to act. To the extent necessary to execute the special powers and functions with which it is endowed by its charter, there is, indeed, an

implied or incidental authority to contract obligations and sue and be sued in the corporate name.[1]

§ 372. Thus, if the corporation is authorized to erect markets, it may contract to buy, or may receive a grant of land, on which to place market buildings, and it may make contracts for the erection of market houses. As it is the general practice in granting municipal charters and in general acts for the incorporation of towns and cities, to enumerate their powers and define their duties, it will suffice in this place to remark generally that the *authority* to enter into contracts necessary and

[1] 1 Kyd, 69, 70; 2 Kent Com. 224; Angell & Ames, Secs. 110, 271; Galena *v.* Commonwealth, 48 Ill. 423, 1868; Straus *v.* Insurance Company, 5 Ohio St. 59, 1855; Chaffee *v.* Granger, 6 Mich. 51; Douglass *v.* Virginia City, 5 Nev. 147, 1869; Goodrich *v.* Detroit, 12 Mich. 279; Bank of Columbia *v.* Patterson, 7 Cranch, 299, 1813; Siebrecht *v.* New Orleans, 12 La. An. 496, 1857; Bateman *v.* Mayor, &c. 3 Hurl. & Nor. 322, 1858.

Under general authority to make all contracts necessary for its welfare, a city may contract for *water works:* Rome *v.* Cabot, 28 Geo. 50; Hall *v.* Houghton, 8 Mich. 458. For *grading streets:* Sturtevant *v.* Alton, 3 McLean, 393. For "*breakwater*" to protect streets of a city on the lake: Miller *v.* Milwaukee, 14 Wis. 642. *Legislative power over municipal contracts: Ante,* Chap. IV.

The city of Richmond possessed, under its charter, all the powers of municipal corporations, including the power "to contract and be contracted with," and its council was specially empowered to "pass all by-laws which they shall deem necessary for the peace, comfort, convenience, good order, good morals, health, or safety of the city, or of the people or property therein." In April, 1865, in anticipation of the evacuation of the city by the confederate army and the entry of the national forces, the *city council ordered the destruction of all the liquor in the city,* and pledged the faith of the city for the payment of its value, and it was decided by the Court of Appeals that under the provisions of the charter above mentioned the council had authority to make the order and pledge, and hence the city was responsible for the value of liquor destroyed under the order of the council: Jones *v.* Richmond, 18 Gratt. (Va.) 517, 1868. Upon the general principles of construction, the author doubts whether the order for the destruction of the liquors was within the scope of the corporate powers of the city: *Ante,* p. 101, Sec. 55. In the absence of a provision in the statute or ordinances to the contrary, a municipal corporation may lawfully enter into a contract with an officer of the corporation: Albright *v.* Town Council, 9 Rich. (South Car.) Law, 399. In this case, a contract entered into between the town council and intendant of a town, whereby the latter agreed to keep the streets in repair, was held valid. See, also, Railroad Company *v.* Claghorn, Speer's Eq. 562.

proper to carry into effect their powers and discharge their duties *is impliedly given* to every such corporation. But this implied authority is only co-extensive with the powers and duties of the corporation; and if any greater authority is claimed it must be sought for in an express or special grant from the legislature. It is scarcely necessary to observe that no contract can be made by a corporation which is prohibited by its charter or by the statute law of the state.[1] And it is a general and fundamental principle of law, that *all* persons contracting with a municipal corporation must, *at their peril, inquire into the power* of the corporation or its officers to make the contract; and a contract beyond the scope of the corporate power is void, although it be under the seal of the corporation.[2] So, also, those

[1] Jackson *v.* Bowman, 39 Miss. 671, 1861. Contracts to violate the charter, or to bargain away or restrict the free exercise of legislative discretion vested in a municipality or its officers in reference to public trusts, are void: *Ib.*; Thomas *v.* Richmond, 12 Wall. 349, 1870, in which notes issued by the city to circulate as money in contravention of law were adjudged void, and the city held not to be liable either in special or general assumpsit.

[2] Marsh *v.* Fulton County, 10 Wall. 676, 1870; *ante*, p. 101, Sec. 55; Leavenworth *v.* Rankin, 2 Kansas, 357, 1864; Horn *v.* Baltimore, 30 Md. 218, 1868; Bridgeport *v.* Railroad Company, 15 Conn. 475, 493, 1843; Haynes *v.* Covington, 13 Sm. & Mar. 408, 1850; Taft *v.* Pittsford, 28 Vt. (2 Wms.) 286, 1856; City Council *v.* Plank Road Company, 31 Ala. 76, 1857; Steam Navigation Company *v.* Dandridge, 8 Gill & J. 248, 319; Hodges *v.* Buffalo, 2 Denio, 110; Baltimore *v.* Eschbach, 18 Md. 276, 282, 1861; Baltimore *v.* Reynolds, 20 Md. 1; Dill *v.* Inhabitants, &c., 7 Met. 438, 1844; Branham *v.* San Jose, 24 Cal. 585, 602; Sturtevant *v.* Alton, 3 McLean, 393, 1844; Wallace *v.* San Jose, 29 Cal. 180; State *v.* Kirkley, 29 Md. 85, 111, 1868; Bateman *v.* Mayor, &c. 3 Hurl. & Nor. 323; State *v.* Haskell, 20 Iowa, 276. Within the scope of its power a corporation may contract to do an act at any place other than the one where it is located: Bank of Utica *v.* Smedes, 3 Cow. 662; Maddox *v.* Graham, 2 Met. (Ky.) 56. Or *prospective* in its terms: Davenport *v.* Hallowell, 10 Maine, 317. As to *coporate seal: Ante*, p. 172. Where a public corporation, transcending its legal power, assumes to direct its officers—for example, commissioners of highways—to bring an action in their own names, or in their name of office, against third persons for trespasses upon the highways, and the action is accordingly brought and the officers are defeated, they cannot sustain an action against the corporation to be reimbursed their costs and expenses; and the reason is, that the action of a corporation directing *such a suit* to be brought, being in excess of its lawful power, is void, and cannot be the foundation of any contract, express or implied: Cornell *v.* Guilford, 1 Denio, 510.

dealing with the agent of a municipal corporation are likewise bound to ascertain the nature and extent of his authority. This is certainly so in all cases where this authority is special and of record, or conferred by statute. The fact in such a case that the agent made false representations in relation to his authority and what he had already done, will not aid those who trusted to such representations to establish a liability on the part of his corporate principal.[1]

§ 373. *Mode of Exercising the Power*— Respecting the *mode* in which contracts by corporations should be made, it is important to observe, that when, as is sometimes the case, the mode of contracting is specially and plainly prescribed and limited, that mode is exclusive, and must be pursued, or the contract will not bind the corporation;[2] but the courts have

[1] Baltimore *v.* Eschbach, 18 Md. 276, 282; Baltimore *v.* Reynolds, 20 Md. 1, 1862; Delafield *v.* State of Illinois, 2 Hill (N. Y.), 159, 174; 26 Wend. 192, 1841; affirming, S. C. 8 Paige, 531, restraining unauthorized sale of bonds: Hodges *v.* Buffalo, 2 Denio, 110; 3 Comst. 430; 2 Barb. 104; Supervisors, &c. *v.* Bates, 17 N. Y. 242, 1858. This case also determines how far, in such a case, the sureties of such an agent or officer are liable for his acts. And see cases cited on p. 245: Chemung Canal Bank *v.* Supervisors, 5 Denio, 517, 1848; Overseers, &c. *v.* Same, 15 N. Y. 341; 2 Comst. 178, *per Strong*, J.; Marsh *v.* Fulton Co. 10 Wall. 676, 1870; Miner's Ditch Co. *v.* Zellarbach, 37 Cal. 543, 1869; Swift *v.* Williamsburg, 24 Barb. 427; Hague *v.* Philadelphia, 48 Pa. St. 527; State *v.* Kirkley, 29 Md. 85, 111; Horn *v.* Baltimore, 30 Md. 218, 1868; Thomas *v.* Richmond, 12 Wall. 349, 1870, *per Bradley*, J.

Special and limited authority to *borrow money* conferred upon the town treasurer, when exercised, is exhausted, and the town is not liable for money he subsequently borrows and converts to his own use, although he assumed to act, and was, by the lender, supposed to be acting under the authority conferred upon him: Savings Bank *v.* Winchester, 8 Allen, 109, 1864; *ante*, p. 126.

[2] Head *v.* Insurance Company, 2 Cranch (U. S.), 127, 1804; White *v.* New Orleans, 15 La. An. 667; *Infra*, Sec. 388; Dey *v.* Jersey City, 19 N. J. Eq. 412, 1869; Baltimore *v.* Reynolds, 20 Md. 1. Speaking of this subject in the case first cited, *Marshall*, C. J., says: "The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and *when it prescribes to them a mode of contracting*, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated." Approved, Bank of United States *v.* Dandridge, 12 Wheat. 64, 68, 1827; see also Angell & Ames, Corp. Sec. 253; Diggle *v.* Railway Company, 5 Exch. 442; Homersham *v.* Wol. &c. Company,

sometimes regarded provisions on this subject as directory. Thus, where the charter directed the mode in which moneys should be drawn from the treasury to be by an *order* of the council, signed by the mayor, such an order issued upon a memorandum in the minutes of the corporation, without a formal order being entered, was adjudged a sufficient compliance with the charter.[1] But unless the mode be prescribed and limited, valid contracts within the scope of the corporate powers may be made, as we shall see, otherwise than under seal or in writing.

§ 374. *Seal Not Necessary — How Concluded.*— Modern decisions have established the law to be, that the contracts of municipal corporations need not be under *seal* unless the charter so requires. The authorized body of a municipal corporation may bind it by an *ordinance*, which, in favor of private persons interested therein, may, if so intended, operate as a contract; or they may bind it by a *resolution*, or by *vote* clothe its officers, agents, or committees, with power to act for it; and a contract made by persons thus appointed by the corporation, though by parol (unless it be one which the law requires to be in writing) will bind it.[2]

4 Eng. Law & Eq. 426; Frend *v.* Dennett, 4 C. B. (N. S.) 576; Butler *v.* Charlestown, 7 Gray (Mass.), 12; Trustees *v.* Cherry, 8 Ohio St. 564, 1858; Bladen *v.* Philadelphia, 60 Pa. St. 464; McCracken *v.* San Francisco, 16 Cal. 591; Piemental *v.* San Francisco, 21 Cal. 351; Zottman *v.* San Francisco, 20 Cal. 90; Argenti *v.* San Francisco, 16 Cal. 255, 282, opinion of *Field*, C. J. *Post*, chapter on Taxation and Local Assessments. If a corporation sue upon a contract, though it be executory on their part, and not executed, this amounts to a conclusive admission that the contract was duly entered into by them: Grant on Corp 63; 5 Man. & Granger, 192.

[1] Kelly *v.* Mayor, &c. of Brooklyn, 4 Hill (N. Y.), 263, 1843; see Neiffer *v.* Bank, 1 Head (Tenn.), 162; Penrose *v.* Tanlere, 12 Queen's B. 1011; Maddox *v.* Graham, 2 Met. (Ky.) 56.

[2] Fanning *v.* Gregoire, 16 How. (U. S.) 524, 1853; Abbey *v.* Billups, 35 Miss. 618; Alton *v.* Mulledy, 21 Ill. 76, 1859; Western, &c. Society *v.* Philadelphia, 31 Pa. St. 175; *Ib.* 185; Clark *v.* Washington, 12 Wheat. 40, 1827; Hamilton *v.* Railroad Company, 9 Ind. 359, 1857; Ross *v.* Madison, 1 Ind. (Cart.) 281, 1848; Story Agency, Sec. 52, where it is said that, "as the appointment of an agent of a corporation may not always be evidenced by written vote, it is now the settled doctrine — at least in America — that it may be inferred and implied from the adoption or recognition of the acts of the agent by the corporation."

§ 375. The *assent* of a municipal corporation *to the variation or modification of a contract* need not necessarily be expressed by the formal action or resolution of the common council; but it may be *implied from acts* relating to the contract work subsequent to the date of the contract.[1]

In Fleckner *v.* United States Bank, 8 Wheat. (U. S.) 338, 357, 1823, it was urged that a corporation could not authorize any act to be done by an agent by a mere vote of the directors, but only by an appointment under its corporate seal. But the court declared that such a doctrine, whatever may have been its original correctness as applied to common law corporations, had "no application to modern corporations created by statute, whose charters contemplate the business of the corporation to be transacted by a special body or board of directors. And the acts of such a body or board, evidenced by a written vote, are as completely binding upon the corporation, and as complete authority to their agents, as the most solemn acts done under the corporate seal:" *Per Story*, J. Further, as to common seal, see *ante*, p. 172. Authority of agent, in absence of special restriction, may be given by parol or inferred from acts: Detroit *v.* Jackson, 1 Doug. (Mich.) 106; see *ante*, p. 172.

A provision in the organic act of a city, that "on the passage of every by-law or order to enter into a contract by the council, the ayes and nays shall be called and recorded," prescribes how the *order to contract* shall be made and evidenced when directed by the council, but is not a limitation on the power of authorized agents to make a contract *by parol:* Indianola *v.* Jones, 29 Iowa, 282, 1870. *Ante*, Sec. 229.

Contract may be *concluded by ordinance* or action of the council (accepting proposals), without signature by parties: People *v.* San Francisco, 27 Cal. 655, 1865; Sacramento *v.* Kirk, 7 Cal. 419; Logansport *v.* Blakemore, 17 Ind. 318. How shown: San Antonio *v.* Lewis, 9 Texas, 69. In Indianapolis *v.* Skeen, 17 Ind. 628, 1861, it was held that third persons dealing with an agent of the city appointed by the council "*to negotiate its bonds* at not less than" a specified rate, were not obliged to look to the records of the council for either his appointment or his instructions, since they were not necessarily of record there; but persons dealing with such an agent are, of course, bound to ascertain the fact of his appointment and the extent of his authority, but not his private instructions. Authority of agent to *negotiate sale of bonds:* Cady *v.* Watertown, 18 Wis. 322.

[1] Messenger *v.* Buffalo, 21 N. Y. 196, 1860. Where certain work is stipulated to be done under the direction of a street commissioner of a city, this officer has authority, without a vote of the council, to authorize *extra work* to be done, or materials to be furnished, where these are rendered necessary by the action of the city authorities subsequent to the making of the contract, and where, without such extra work or materials, it would be impossible to fulfil the requirements of the contract: *Ib.* Modification of contracts by unauthorized officers not binding upon the corporation: Bonesteel *v.* Mayor, &c. of New York, 22 N. Y. 162, 1860; Hague *v.* Philadelphia, 48 Pa. St. 527. As to changes in contracts *by parol*, see Hasbrouck *v.* Milwaukee, 21 Wis. 217, 1866; compare, Sacramento *v.* Kirk, 7 Cal. 419.

§ 376. *Contracts made by Agents — Mode of Execution.*— Where officers or agents of a corporation, duly appointed, and acting within the scope of their authority in executing an instrument in behalf of the corporation, sign their own names and affix their own seals, such seals are simply nugatory, and the instrument, according to the weight of modern judicial opinion, is to be regarded as the *simple contract of the corporation*, and will bind the corporation and not the individuals executing it, where the purpose to act for the corporation is manifest from the whole paper, and where there are no words evincing an intention to assume a personal liability.[1]

[1] Regents, &c. *v.* Detroit, &c. 12 Mich. 138; Sweetzer *v.* Mead, 5 Mich. 107; Bank of Metropolis *v.* Gottschalk, 14 Pet. 19; Story Agency, Secs. 154, 260, 276, 277; Bank of Columbia *v.* Patterson, 7 Cranch, 299, 307; Hatch *v.* Barr, 1 Ham. (Ohio) 390; Baker *v.* Chambl:s, 4 G. Greene (Iowa), 428; Lyon *v.* Adamson, 7 Iowa, 501; 1 Am. Lead Cas. 602; Mott *v.* Hicks, 1 Cow. 513, 534; Blanchard *v.* Blackstone, 102 Mass. 343; Stanton *v.* Camp (contract signed individually, with addition of "committee"), 4 Barb. 274; Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. 326; Hopkins *v.* Mehaffy, 11 Serg. & Rawle, 126; Angell & Ames, Secs. 293, 295. Where a town clothes its agent, or its committee, with full power to make a contract, and it is accordingly made, it is valid and binding, notwithstanding there has been no formal *acceptance* by a vote, or even if it be afterwards rejected by the corporation: Davenport *v.* Hallowell, 10 Maine, 317; Junkins *v.* School District, 39 Maine, 220, 1855; Willard *v.* Newburyport, 12 Pick. 227; Kingsbury *v.* School District, 12 Met. 99, 1846.

The *power of a committee*, appointed by a vote of a town, "to let out and superintend the making" of a highway, is completely executed by the making of a contract with a third person embracing the whole subject matter of the vote and by the superintending of the construction of the highway. And, therefore, if the person contracted with fails to complete the road according to his contract, this is a matter for the *town* to deal with, and the committee have no power, without new authority from the town, to enter into a contract with another person for its completion. If they do so, and pay money in pursuance thereof, the town is not liable to them therefor. Nor is it liable if they transcend their power, and make a contract for a more expensive road than they were authorized to do: Keyes *v.* Westford, 17 Pick. 273, 1835.

Power to a *town committee* "to superintend the building of a house for the town," was adjudged to include the power to make the necessary contracts, it not appearing that any other or special committee or agent was appointed for that purpose—the court being of opinion that the making of contracts was essential to the building of the house: Damon *v.* Granby, 2 Pick. 345, 1824. *Ante*, Chaps. IX. X.

§ 377. A few cases will be referred to, *illustrating the rule* just stated. A contract in relation to the survey of a city, a subject exclusively appertaining to the corporation, was entered into "between T. Van V., J. W., C. D. C., a committee appointed by the corporation of the city of Albany for that purpose, of the first part, and John R. Jr., of the second part." The parties of the first part agreed to pay for the work to be done, and signed their individual *names* and affixed their individual *seals* to the agreement. The authority of the committee to act for the corporation and to make the contract being conceded, it was ruled that they were not personally liable, and that it must be enforced by and against the corporation.[1] In another case, a contract for the repair of an engine house of a city was entered into by the inspector of the fire department in his own name, describing himself as "G. N. S., inspector, &c., of the first part," and signed in the same way. It was, in fact, made for and on account of the city, and it was held that the city was liable thereon, although its agent did not use its name in contracting, the court being of opinion, however, that the contract on its face showed it was made for the city.[2]

§ 378. So, where on a sale of real property by a corporation, a memorandum of the sale was signed by the parties, on which it was stated that the sale was made to A. B., the purchaser, and that he, C. D., "mayor of the corporation, on behalf of himself and the rest of the burgesses and commonalty of the borough of Caermarthen, do mutually agree to perform and fulfil, on each of their parts respectively, the conditions of the sale," and then came the signature of the purchaser, and of "C. D., Mayor." It was held that the agreement was that of the corporation, and not that of the mayor personally; and that, consequently, the mayor could not sue thereon.[3]

[1] Randall *v.* Van Vechten, 19 Johns. 60, 1821; compare, however, Fullam *v.* Brookfield, 9 Allen, 1, 1864, where the court denies the doctrine of Randall *v.* Van Vechten, Bank, &c. *v.* Patterson, 7 Cranch, 299, and certain *dicta* in Damon *v.* Granby, 2 Pick. 345. But the text states the prevailing American rule. See also Dubois *v.* Canal Company, 4 Wend. 285; Worrell *v.* Munn, 1 Seld. 229; Ford *v.* Williams, 3 Kern. 577, 585; Richardson *v.* Scott, &c. Co. 22 Cal. 150.

[2] Robinson *v.* St. Louis, 28 Mo. 488, 1859.

[3] Bowen *v.* Morris, 2 Taunt. 374, 387.

§ 379. But the action or contract of the officers of a public corporation in their *individual capacity*, is not binding upon the corporate body.[1] For example: If the selectmen of a town in New England, as *individuals*, request a citizen to furnish supplies to a public enemy, to prevent violence to the town, this gives no legal right of recovery against the town; and as the transaction was wholly beyond the official duty of selectmen, or the duty of the town as a corporation, it was doubted whether a regular vote to pay the plaintiff would have been legal, though it was admitted that a voluntary agreement among the *inhabitants* to this effect would have been binding, being founded on a meritorious consideration, as it was *their* property, and not that of the town, which was in danger.[2]

§ 380. While the agent of a public corporation, who by its vote or authority contracts for its use, cannot bind the corporation by making a contract *by deed:* yet if such agent had authority to make the contract, it is binding upon the corporation as *evidence* of such contract. It follows that a contract of an agent or committee of a town, under his or their own seals, cannot be declared on, *in covenant or debt*, as the deed of the town. The *form* of the remedy against the town[3] is for

[1] Haliburton *v.* Frankford, 14 Mass. 214, 1817; Butler *v.* Charlestown, 7 Gray, 12, 1856.

[2] Haliburton *v.* Frankford, *supra;* Stetson *v.* Kempton, 13 Mass. 272, 1816. A majority of selectmen may, by statute, bind a town in New Hampshire by their written contract when acting within the limits of their authority. But a contract signed by one only of the selectmen in his own name, "for the selectmen," does not bind the town, nor will it be rendered valid by proof that another selectman authorized him so to sign the contract, or by proof that such was the practice in the town. If the *corporate name* had been affixed by one, such proof might have been sufficient: Andover *v.* Grafton, 7 N. H. 298, 305; Mason *v.* Bristol, 10 N. H. 36; Hanover *v.* Eaton, 3 N. H. 38. Powers of towns in New England: *Ante*, p. 39.

Contracts made by a majority of the board of aldermen, without any *official action* of the city council, are not binding upon the city; so decided where counsel were thus employed who rendered legal services beneficial to the corporation: Butler *v.* Charlestown, 7 Gray, 12, 1856; see also Sikes *v.* Hatfield, 13 Gray, 347, 1859. See chapter on Corporate Meetings, *ante.*

[3] Randall *v.* Van Vechten, 19 Johns. 60, 65, 1821; Damon *v.* Granby, 2 Pick. 345, 1824; compare, Fullam *v.* Brookfield, 9 Allen, 1; Bank of Columbia *v.* Patterson's Administrator, 7 Cranch, 229, and rule as stated by *Story*, J., 306, 1813; Clark *v.* Cuckfield Union, 11 Eng. Law & Eq. 442; Pennington *v.* Taniere, 12 Queen's B. 1011. *Ante*, p. 173, Sec. 132.

damages, or in *assumpsit*. Although in Damon *v.* Granby[1] it was left an open question, whether a vote of a town having no corporate seal, expressly authorizing an agent to make a deed of land, or other contract, *under seal*, would, if executed according to the power, become technically the deed of the town, no substantial reason is perceived why such an instrument, thus executed, should not be treated as having all the attributes and qualities of a sealed instrument. If the corporation, however, has a common seal, which is the case with towns in many of the states, and with cities generally, and it is affixed to an instrument in pursuance of a vote of the corporation, or by the proper officer, such an instrument is, beyond doubt, technically the deed of the corporation.[2]

§ 381. *Contracts in Excess of Corporate Power.—Ultra Vires as a Defence.*—The general principle of law is settled, beyond controversy, that the agents, officers, or even city council, of a municipal corporation, *cannot bind the coporation* by any contract which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation, or which (not being in terms authorized) is against public policy. This doctrine grows out of the nature of such institutions, and rests upon reasonable and solid grounds. The inhabitants are the corporators—the officers are but the public agents of the corporation. Their duties and powers are prescribed by statute or charter, which all persons not only may know, but are bound to know. The opposite doctrine would be fraught with such danger, and accompanied with such abuse, that it would soon end in the ruin of municipalities, or be legislatively overthrown. These considerations vindicate both the reasonableness and necessity of the rule that the corporation is bound only when its agents or officers, by whom it can alone act, if it acts at all, keep within the limits of the chartered authority of the corporation. The history of the workings of municipal bodies has demonstrated the salutary nature of this principle, and that it is the part of true wisdom to keep the corporate wings

[1] Damon *v.* Granby, 2 Pick. 345, 352, 1824.

[2] *Ib.* Randall *v.* Van Vechten, 19 Johns. 60, 65, 1821. But see Fullam *v.* Brookfield, 9 Allen, 1.

clipped down to the lawful standard.[1] It results from this doctrine that unauthorized contracts are void, and in actions thereon the corporation may successfully interpose the plea of *ultra vires*, setting up as a defence its own want of power under its charter or constituent statute to enter into the contract.[2]

[1] This subject is touched upon in the concluding portion of Chap. I. *ante*.

[2] *Post*, Chap. XXIII., and see also the following cases: Marsh *v.* Fulton County, 10 Wall. 676, 1870; Thomas *v.* Richmond, 12 Wall. 349, 1870; Bridgeport *v.* Housatonic Railroad Company, 15 Conn. 475, 493, 1843; Martin *v.* Mayor, &c. 1 Hill (N. Y.), 545, 1841; Overseers, &c. *v.* Same, 18 Johns. 382; Donovan *v.* New York, 33 N. Y. 291; Siebrecht *v.* New Orleans, 12 La. An. 496, 1857; Clark *v.* Des Moines, 19 Iowa, 199, 209, 1865; Loker *v.* Brookline, 13 Pick. 343, 348; Philadelphia *v.* Flanigan, 47 Pa. St. 21; Trustees *v.* Cherry, 8 Ohio St. 564; Hague *v.* Philadelphia, 48 Pa. St. 527; Albany *v.* Cunliff, 2 Comst. (N. Y.) 165, 1849, reversing S. C 2 Barb. 190; Cuyler *v.* Rochester, 12 Wend. 165, 1834; Hodges *v.* Buffalo, 2 Denio, 110, 1846; Halstead *v.* Mayor, 3 Comst. 430, 1850; Martin *v.* Mayor, 1 Hill, 545; Boone *v.* Utica, 2 Barb. 104; Cornell *v.* Guilford, 1 Denio, 510; Boyland *v.* Mayor, &c. of New York, 1 Sandf. (N. Y.) 27, 1847; Dill *v.* Wareham, 7 Metc. 438, 1844; Vincent *v.* Nantucket, 12 Cush. 103, 105, 1858, *per Merrick*, J.; Stetson *v.* Kempton, 13 Mass. 272; Parsons *v.* Inhabitants of Goshen, 11 Pick. 396; Wood *v.* Lynn, 1 Allen (Mass.), 108, 1861; Spalding *v.* Lowell, 23 Pick. 71; Mitchell *v.* Rockland, 45 Maine, 496, 1858; S. C. 41 *ib.* 363; Anthony *v.* Cleveland, 12 Ohio, 375, 1861; Commissioners *v.* Cox, 6 Ind. 403, 1855; Inhabitants *v.* Weir, 9 *ib.* 224, 1857; Smead *v.* Railroad Company, 11 *ib.* 104, 1858; Brady *v.* Mayor, 20 N. Y. (6 Smith) 312; Appleby *v.* The Mayor, &c. 15 How. Pr. 428; Estep *v.* Keokuk County, 18 Iowa, 199, and cases cited by *Cole*, J.; Clark *v.* Polk County, 19 Iowa, 248, 1865.

Corporation may defend against unauthorized contract, although its *seal* is attached to it: Leavenworth *v.* Rankin, 2 Kansas, 358, 1864. *Ante*, p. 172.

Mr. Justice *Coulter*, in delivering the opinion in Allegheny City *v.* McClurkan, 14 Pa. St. 81, expresses the opinion that a municipal corporation may be liable for the unauthorized contracts of its officers, when these are publicly entered into with the knowledge of the people, and not objected to until after the rights of third persons have attached. Such a principle is believed to be both unsafe and unsound; the only true and safe view being that all persons are bound to take notice of the powers and authority which the law confers upon the officers of such corporations: See Loker *v.* Brookline, 13 Pick. 343. Auditing and paying *part* of a claim presented, accompanied with a denial of liability for the residue, does not estop the debtor corporation from contesting the residue, even though it be upon grounds which show the former allowance to have been improper: People *v.* Supervisors, 1 Hill (N. Y.), 362, 1841. In an action on a contract for doing work which a municipal corporation had the power to make, it is no defence that the city ought to have adopted some less expensive means of accomplishing the purpose in view: Livingston *v.* Pippin, 31 Ala. 542, 1858.

In favor of *bona fide* holders of negotiable securities, the corporation may be estopped to avail itself of irregularities in the exercise of power conferred; but it may always show that under no circumstances could the corporation lawfully make a contract of the character in question. This subject has, however, been already referred to, and will be considered in a subsequent portion of the present chapter.[1]

§ 382. Agreeably to the foregoing principles, a corporation cannot maintain an action on a bond or a contract which is *invalid*, as where a city, without authority, loaned its bonds to a private company, and took from it a penal bond, conditioned for the faithful application of the city bonds to works which the city had no power to construct or assist in constructing.[2] So a contract by a city to waive its right to go on with the laying out of a street or not, as it might choose, is, it seems, against *public policy*, and it is void if it amounts to a surrender of its legislative discretion.[3] So a promise to pay a public corporation, or their agents, a premium for doing their duty, is *illegal and void;* and a contract will not be sustained which tends to restrain or control the unbiased judgment of public officers. But a promise by individuals to pay a portion of the expenses of public improvements does not necessarily fall within this principle, and such a promise is not void as being against pub-

The case of The State *v.* Buffalo, 2 Hill (N. Y.), 434, determines an interesting point. Arms belonging to the State were loaned to the city authorities to suppress disorderly assemblages. The keeper of the arsenal had no right to make the loan, but it was made in good faith, and the bond of the city taken for their return on demand. The city being sued on this bond, made the point that it was void for illegality, but the court regarded it rather as a *bona fide* excess of authority simply, and held that though the loan was unauthorized the state might waive the tort committed on the property and seek a remedy upon the bond.

[1] *Ante*, p. 149, Sec. 108; *infra*, Secs. 415–426.

[2] City Council *v.* Plank Road Company, 31 Ala. 76, 1857. See Mayor, &c. *v.* Winter, 29 *ib.* 651; Halstead *v.* Mayor. &c. 3 Comst. 430; S. C. 5 Barb. 218; Bridgeport *v.* Housatonic Railroad Company, 15 Conn. 475, 493.

[3] Martin *v.* Mayor, &c. 1 Hill (N. Y.), 545, 1841; *ante*, Chap. V. As to *public policy*, see Ohio, &c. Company *v.* Merchants, &c. Company, 11 Humph. (Tenn.) 1; *ante*, Chap. XII. Corrupt agreements with aldermen, to influence them to a particular course in the discharge of official duties, are, of course, void, no matter to whom executed: Cook *v.* Shipman, 24 Ill. 614.

lic policy; and if the promissors have a peculiar and local interest in the improvement, their promise is not void for want of consideration, and may be enforced against them.[1] So, on the other hand, a party making with a city a contract which is *ultra vires*, is *not estopped*, when sued thereon by the corporation for damages, to set up its want of authority to make it.[2]

§ 383. *Implied Contracts.*—The present state of the authorities clearly justifies the opinion of Chancellor *Kent*, that corporations may be bound, by *implied contracts* within the scope of their powers, to be deduced by inference from authorized corporate acts, without either a vote, or deed, or writing.[3] This

[1] Townsend *v.* Hoyle, 20 Conn. 1, 1849. This case holds that a promise by the defendants to pay the city the expense of laying a certain street was binding; and *Ellsworth*, J., in delivering the opinion, said: "We cannot assent to the proposition that a promise by individuals to pay a part of the expenses of public improvements, ordered by public authority, is, of course, illegal and void. The amount or cost may properly enough enter into the question of expediency or necessity. If made in one way or in one place, it will be much better for the public, though more expensive; but individuals especially benefited stand ready, by giving their land, their money, or their labor, to meet the extra expense. Will these promises be void, as being without consideration, or against public policy? We think not." See Chapter on Streets, *post.*

[2] City Council *v.* Plank Road Company, 31 Ala. 76, 1857; Steam Navigation Company *v.* Dandridge, 8 Gill. & J. 248, 319, 320; Hodges *v.* Buffalo, 2 Denio, 110. If a corporation has received money in advance, on a contract void on account of want of authority to make it, and afterwards refuses to fulfil the contract, the party advancing the money may, without demand, recover it back in an action for money had and received: Dill *v.* Wareham, 7 Met. 438, 1844. In this case the corporate defendant undertook, without authority, to transfer to the plaintiff the right of taking oysters within its limits; contract held wholly void. See, also, McCracken *v.* San Francisco, 16 Cal. 591. *Infra*, Secs. 383, 384. Compare Herzo *v.* San Francisco, 33 Cal. 134. That the contract of agents within the scope of corporate power may be ratified, or a contract implied from the enjoyment of the benefit of the consideration: San Francisco Gas Company *v.* San Francisco, 9 Cal. 453, 1858, opinion of *Field*, J.; Backman *v.* Charlestown, 42 N. H. 125. See Bissell *v.* Railroad Company, 22 N. Y. 258.

[3] 2 Kent Com. 291; Bank of Columbia *v.* Patterson, 7 Cranch, 299 (1813—a leading American case); Mott *v.* Hicks, 1 Cow. 513; Dunn *v.* Rector, &c., 14 Johns. 118; Bank *v.* Dandridge, 12 Wheat. 74; Perkins *v.* Insurance Company, 4 Cow. 645; Davenport *v.* Peoria Insurance Company, 17 Iowa, 276, and cases cited by *Cole*, J.; American Insurance Company *v.* Oakley, 9 Paige, 496; Magill *v.* Kauffman, 4 Serg. & Raw. 317; Randall *v.* Van Vech-

doctrine is applicable equally to public and private corporations, but in applying it, however, care must be taken not to violate other principles of law.[1] Thus it is obvious that an implied promise cannot be raised against a corporation, where by its charter it can only contract in a prescribed way, except it be a promise for money received, or property appropriated under the contract.[2] So where the corporation orders local street improvements to be made, for which the abutters are the parties ultimately liable, and which, by the charter, must be made in a prescribed mode; if made without any contract,

ton, 19 Johns. 60. Wayne County *v.* Detroit, 17 Mich. 390; Lesley *v.* White, 1 Spears (S. Car.) Law, 31; Canaan *v.* Derush, 47 N. H., 211; Lebanon *v.* Heath, *Ib.* 353; Adams *v.* Farnsworth, 15 Gray, 423; Shrewsbury *v.* Brown, 25 Vt. 197; Gassett *v.* Andover, *Ib.* 342; Peterson *v.* Mayor, &c. of New York, 17 N. Y. 449, 453, 1858; Danforth *v.* Schoharie Turnpike Company, 12 Johns. 227; Angell & Ames, Sec. 237; Maher *v.* Chicago, 38 Ill. 266; Frankfort Bridge Company *v.* Frankfort, 18 Ben. Mon. 41.

[1] Peterson *v.* Mayor, &c. of New York, 17 N. Y, 449, 453; Poultney, *v.* Wells, 1 Aiken (Vt.), 180; Where a city contracted with a railroad company to do certain work, and the company employed persons to do it, there is no implied contract on the part of the city to pay them, although the city saw them at work: Alton *v.* Mulledy, 21 Ill. 76, 1859.

Must be an authorized request: "No person can make himself a creditor of another by voluntarily discharging a duty which belongs to that other." *Strong*, J., in Salsbury *v.* Philadelphia, 44 Pa. St. 303; Baltimore *v.* Poultney, 25 Md. 18. In Seibrecht *v.* New Orleans, 12 La. An. 496, 1857, carpets were furnished for certain corporation courts, by order of the clerks or judges, but without any authority of the common council, and it was worn out before the plaintiff presented his bill. It was contended that the city was liable *ex equo et bono*, having used, and not returned, the carpets; but it did not appear that the *council* knew that they had been purchased for the city, and were being used in its buildings. The court denied the liability, saying that "The only safe rule is to hold that the city cannot be bound for any contract made without its authorization, expressed by a resolution of the common council." That an unauthorized contract, however advantageous, does not bind the corporation, see Loker *v.* Brookline, 13 Pick. 343; Jones *v.* Lancaster, 4 Pick. 149; Wood *v.* Waterville, 5 Mass. 294.

A contract was implied on the part of a city, which was bound to support its paupers and which had refused, to pay a person who had furnished a pauper with necessaries: Seagraves *v.* Alton, 13 Ill. 371. Here it will be noticed that there was an express refusal on the part of the city to support the pauper, and yet a promise was *implied*. This implication is a pure fiction to support what the court regarded as a just claim.

[2] McSpedon *v.* Mayor of New York, 7 Bosw. 601; McCracken *v.* San Francisco, 16 Cal. 591; Piemental *v.* San Francisco, 21 Cal. 351.

or a valid one, the doctrine of implied liability does not apply in favor of the contractor, unless, indeed, the corporation has collected the amount from the adjoining owners and has it in its treasury.[1]

§ 384. "The doctrine of *implied municipal liability*," says Mr. Chief Justice *Field*, in a case where the subject underwent very thorough examination, "applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtain money of another by mistake, or without authority of law, it is her duty to refund it — not from any contract entered into by her on the subject, but from the general obligation to do justice, which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it; or if used by her, to render an equivalent to the true owner, from the like general obligation: the law, which always intends justice, implies a promise. In reference to *money* or *other property*, it is not difficult to determine in any particular case, whether a liability with respect to the same has attached to the city. The money must have gone into her treasury, or been appropriated by her, and when it is property other than money, it must have been used by her, or be under her control. But with reference to *services rendered*, the case is different. Their acceptance must be evidenced by ordinance [or express corporate action] to that effect. If not originally authorized, no liability can attach upon any ground of implied contract. The acceptance upon which alone the obligation to pay could arise, would be wanting. As a general rule, undoubtedly, a city corporation is only liable upon express contracts, authorized by ordinance [or other due corporate proceedings]. The exceptions relate to liabilities from the use of money or other property which does not belong to her, or to liabilities springing from the neglect of duties im-

[1] Argenti *v.* San Francisco, 16 Cal. 255 — opinion of *Field*, C. J. A municipal corporation was holden liable, under its charter, upon an implied assumpsit to collect and pay over assessments awarded to property owners, for the opening of a street: Wheeler *v.* Chicago, 24 Ill. 105, 1860; see *infra* Secs. 388, 400, 403.

posed by the charter, from which injuries to parties are produced. There are limitations even to these exceptions, in many instances, as where property or money is received in disregard of positive prohibitions; as, for example, the city would not be liable for moneys received upon the issuance of bills of credit, as this would be, in effect, to support a proceeding in direct contravention of the inhibition of the charter."[1] Nor for money received for notes issued by it to circulate as money, in violation of an express statute and the public policy of the state.[2]

§ 385. *Ratification of Unauthorized Contract.*— A municipal corporation may *ratify* the unauthorized acts and contracts of its agents or officers, which are *within the corporate powers*, but not otherwise. Ratification may be inferred from acquiescence after knowledge of all the material facts, or from acts inconsistent with any other supposition. The same principle is applicable to corporations as to individuals.[3] The employment,

[1] Per *Field*, C. J., in Argenti *v.* San Francisco, 16 Cal. 255, 282, 1860.

[2] Thomas *v.* Richmond, 12 Wall. 349, 1870. The principles upon which the decision rests are admirably stated in the opinion of Mr. Justice *Bradley*.

Illustrations of implied liability.— City is liable for gas furnished to it with knowledge of the council, though no ordinance or resolution was passed authorizing it to be furnished: Gas Company *v.* San Francisco, 9 Cal. 453, 466, 1858— opinion of *Field*, J. If a city sells its *void* bonds, there is an implied assumpsit to repay the purchase-money: Paul *v.* Kenosha, 22 Wis. 266, 1867. Where a bridge corporation was requested by the city authorities to communicate to them the terms upon which the city might attach its water pipes to the bridge, to carry the water from one side of the river to the other, which the bridge company answered, fixing a sum, upon which the city council took no action, but proceeded to extend the water works, and used the bridge, the court held that the city was liable: Bridge Company *v.* Frankfort, 18 Ben. Mon. 41, 1857.

[3] People *v.* Swift, 31 Cal. 26, 1866; Bleu *v.* Bear River Company, 20 Cal. 602, 1862; Peterson *v.* Mayor, 17 N. Y. 449, 453, 1858, and authorities cited, reversing S. C. 4 E. D. Smith, 413; San Francisco Gas Company *v.* San Francisco, 9 Cal. 453; Hoyt *v.* Thompson, 19 N. Y. 207, 218, 1859; Howe *v.* Keeler, 27 Conn. 538; Emerson *v.* Newberry, 13 Pick. 377; Hodges *v.* Buffalo, 2 Denio, 110, 1846; 5 *ib.* 567; People *v.* Flagg, 17 N. Y. 584; S. C. 16 How. Pr. R. 36; Brady *v.* Mayor, &c. of New York, 20 N. Y. 312, affirming S. C. 2. Bosw. 173; Delafield *v.* State of Illinois, 2 Hill (N. Y.), 159, 176, 1841; S. C. 8 Paige, 531, and 26 Wend. 192; Mills *v.* Gleason, 8 Am. Law Reg. 693; S.

however, by a municipal council of an attorney to defend a policeman charged with an assault, does not adopt his act so as to render the city liable for the damages recovered against him.[1]

§ 386. Where work done for a corporation, without complete legal authorization, is beneficial to it, and the price reasonable, strong *evidence of the assent* of the corporation is not required; *but such assent must be shown.* Ratification of the acts of a committee in building upon the land of the district a more expensive house than they were authorized to do by the vote of the corporation, cannot be inferred from the mere fact that the school is kept in it for a few weeks, there being no evidence that the corporation had knowledge of the over expenditure, or had taken any action on the subject.[2]

C. 11 Wis. 470, 1860; Dubuque, &c. College *v.* Township, &c. 13 Iowa, 555; Merrick *v.* Plank Road Company, 11 Iowa, 74, *per Wright*, J.; Detroit *v.* Jackson, 1 Doug. (Mich.) 106; Crawshaw *v.* Roxbury, 7 Gray, 374.

A municipal corporation may ratify unauthorized expenditures, not *ultra vires*, which they deem beneficial to it, and such ratification as in the case of natural persons is equivalent to previous authority: Backman *v.* Charlestown, 42 N. H. 125; Harris *v.* School District, 8 Fost. (N. H.) 65; Wilson *v.* School District, 32 N. H. 118; Keyser *v.* School District, 35 N. H 477; Episcopal Society *v.* Episcopal Church, 1 Pick. 372; Bank *v.* Patterson, 7 Cranch, 299; Randall *v.* Van Vechten, 19 Johns. 60; Trott *v.* Warren, 2 Fairf. (Maine) 227; Topsham *v.* Rogers, 42 Vt. 189; People *v.* Swift, 31 Cal. 26. In De Grave *v.* Monmouth, 19 Eng. C. L. 300, it was held that the examination of weights and measures, which had been ordered by a mayor *de facto*, and which were the subject of the controverted contract, at a meeting of the corporation, and the subsequent use of some of them, recognized the contract for their purchase and made the corporation liable to pay for them. *Infra*, Sec. 387.

[1] Buttrick *v.* Lowell, 1 Allen (Mass.), 172, 1861.

[2] Wilson *v.* School District, 32 N. H. 118, 1855. See, further, as to effect of *use as a ratification:* Kingman *v.* School District, 2 Cush. 425; Davis *v.* School District, 24 Maine, 349; Lane *v.* School District, 10 Met. 462; Chaplin *v.* Hill, 24 Vt. (1 Dean) 528; Fisher *v.* School District, 4 Cush. 294; Taft *v.* Montague, 14 Mass. 285; Keyser *v.* School District, 35 N. H. 477; Pratt *v.* Swanton, 15 Vt. 147 (use of bridge by public).

In Wilson *v.* School District, above cited, Mr. Justice *Bell* well remarks: "In most cases where work and labor is performed upon real estate by contract, the *mere fact that the owner makes use* of the building or structure built upon his land, furnishes no evidence of approval or acceptance, because he has no choice to reject it. Alone, the use of such buildings gives no evi-

§ 387. The *ratification*, whatever its form, must be by the *principal or by authorized agents.* This is well illustrated by a case where, by statute, certain agents or officers of a *State* were authorized to borrow money for public use, and for that purpose to sell its bonds at not less than their *par* value. They exceeded their power by selling for *less than par*, and *on credit.* It was contended that this contract was *ratified*, because the governor, after he knew of the contract, signed the bonds and caused them to be delivered, and because the auditor and some of the other state officers acted under the contracts, drawing

dence of acceptance. Accompanied by silence, and absence of complaint, where to complain would be natural and suitable, or by any circumstance indicating acquiescence, it would be sufficient:" 32 N. H. 125. As to *effect of acceptance of public work* by the agents of the town, see Wadleigh *v.* Sutton, 6 N. H. 15, 1832. Of school house built upon a *quantum meruit* employment by a committee, but without a legal contract: Kimball *v.* School District, 28 Vt. 8, 1855. See, also, Corwin *v.* Wallace, 17 Iowa, 334; Zottman *v.* San Francisco, 20 Cal. 96 (valuable discussion); Jordan *v.* School District, 38 Maine, 164, 1854. Surveyor of highways cannot recover of the town for work voluntarily performed, there being no contract, not even if beneficial: Sikes *v.* Hatfield, 13 Gray, 347, 1859. *Infra*, Secs. 388, 400.

A public corporation is not liable for work done against, or even without, its direction and authority (such as building a bridge, road, school house, &c.), although these are afterwards used by the public or the district: Loker *v.* Brookline, 13 Pick. 343, 1832; Knowlton *v.* Inhabitants, &c. 14 Maine (2 Shep.), 25, where note *critique* on, and remarks of C. J. *Mellen*, as to Hayden *v.* Madison, 7 Greenl. 76; Morrell *v.* Dixfield, 30 Maine (17 Shep.), 157, 160; Davis *v.* School District, 24 Maine (11 Shep.), 349; Hayward *v.* School District, 2 Cush. 419, 1848; *ib.* 426; Moor *v.* Cornville, 13 Maine, 293, 1836, where the action was brought by the surveyor or supervisor of highways, who built a bridge without pursuing the course pointed out by law; Allen *v.* Cooper, 22 Maine, 133 (deciding that the power of a committee with authority to contract to make a road does not embrace power to accept the work or waive performance). But if the work be done under belief of authority, as where it was performed under a contract with a committee who assumed to have authority, but who, in fact, had none, then if the corporation accept it, or even knowingly avail itself of it, it will be liable to pay a reasonable compensation, and a promise thus to pay may be implied on the part of a corporation from the acts of its general agent, or an agent with powers of a general character [?]: Abbot *v.* Herman, 7 Greenl. 118; Hayden *v.* Madison, *ib.* 79. "Perhaps these two cases carry the doctrine of the implied responsibility of corporations as far as it ought to be carried:" *Per Emery*, J., in Ruby *v.* Abysm. Society, 15 Maine, 306, 308, 1839. And see, particularly, Jordan *v.* School District, and other cases cited, *supra;* Baltimore *v.* Reynolds, 20 Md. 1, 1862; Hague *v.* Philadelphia, 48 Pa. St. 527.

money and receiving payments. But it was held that these officials were likewise agents of limited authority — that, as they would have had no power to make the contracts originally, they could not ratify them; that ratification must come from the principal — the State — represented by its legislature.[1]

§ 388. *Letting to the Lowest Bidder.*— Where the charter or incorporating act requires the officers of the city to award con-

[1] Delafield *v.* State of Illinois, 2 Hill (N. Y.), 159, 175, where difference between ratification by a *state* and by other corporations and individuals is clearly set forth by *Bronson*, J.; affirming, S. C. 8 Paige, 531; S. C. further, 26 Wend. 192. In further illustration of the text, see Hague *v.* Philadelphia, 48 Pa. St. 527; Hotchin *v.* Kent, 8 Mich. 526; Marsh *v.* Fulton County, 10 Wall. 676, 1870; Dubuque, &c. College *v.* Dubuque, 13 Iowa, 555; Estey *v.* Inhabitants of Westminster, 97 Mass. 324; Branham *v.* San Jose, 24 Cal. 585.

In applying the doctrine that *unauthorized corporate acts may be ratified*, other principles of law must be borne in mind. The care which, in this respect, should be observed, is very clearly set forth by *Denio*, J., in giving judgment in Peterson *v.* Mayor, &c. of New York, 17 N. Y. 449, 454, 1858. "For instance, no sort of ratification can make good an act without the scope of the corporate authority. So where the charter or a statute binding upon the corporation has committed a class of acts to particular officers or agents, other than the governing body, or where it has prescribed certain formalities as conditions to the performance of any description of corporate business, the proper functionaries must act, and the designated forms must be observed, and generally no act of recognition can supply a defect in these respects:" Brady *v.* Mayor, &c. 20 N. Y. 312; Hodges *v.* Buffalo, 2 Denio (N. Y.), 110; 17 N. Y. 584. Gates *v.* Hancock, 45 N. H. 528; Reilly *v.* Philadelphia, 60 Pa. St. 467. *Supra*, Secs. 385, 386.

Where the corporation can only act by *ordinance*, the ratification must be by ordinance: McCracken *v.* San Francisco, 16 Cal. 591, 1860; Piemental *v.* San Francisco, 21 Cal. 351; Cross *v.* Morristown, 18 N. J. Eq. 305, 1867. *Ante*, Chap. XII.

Legislature may, within constitutional limits, ratify or authorize ratification: Campbell *v.* Kenosha, 5 Wall, 194; Supervisors *v.* Schenck, *ib.* 772; Keithsburg *v.* Frick, 34 Ill. 405; Mills *v.* Gleason, 11 Wis. 470; Winn *v.* Macon, 21 Geo. 275; Grogan *v.* San Francisco, 18 Cal. 590, 1861; Hasbrouck *v.* Milwaukee, 21 Wis. 217, 1866. *Ante*, p. 92, Sec. 46; p. 149, note. In Shawnee County *v.* Carter, 2 Kansas, 115, 1863, the Supreme Court of Kansas held invalid, as not being within the rightful scope of legislative power, an act of the legislature which declared valid and binding *bonds* which had been issued by the county officers on account of the county court house, and which *bonds* were not enforceable against the county because differing in form and substance from the warrants authorized by the statute. Such a strict limitation on legislative power is not generally asserted. See, on this point, Chap. IV. *ante*.

tracts to the lowest bidder, a contract made in violation of its requirements is illegal; and in an action brought on such contract for the work, the city may plead its illegality in defence.[1]

§ 389. The Supreme Court of Michigan has affirmed, while the Supreme Court of Wisconsin and of other states have denied, the proposition that where a city charter provides that no contracts shall be made by the city except with the *lowest bidder*, after advertisement of proposals, it does not prohibit the corporation from contracting to lay *Nicholson pavement*, though the right to lay it is patented and owned by a single firm. The question is close, but there is a marked tendency in the courts to adopt the Wisconsin view.[2]

[1] Brady *v.* Mayor, &c. of New York, 20 N. Y. (6 Smith) 312, 1859. It is intimated that it is not essential to the defence that the city should show a fraudulent collusion between the bidder and the officers awarding the contract. Whether the city is liable on a *quantum meruit* to one who has *bona fide* performed labor under a void contract where the work has been accepted and used, was not determined: *Ib.* S. C. 2 Bosw. 173; 7 Abb. Pr. R. 234; 16 *ib.* 432. As further illustrating the text, see People *v.* Flagg, 17 N. Y. 584; Peterson *v.* Mayor, &c. 17 N. Y. 457, referring to but expressing no opinion upon Christopher *v.* Mayor, &c. 13 Barb. 567; Appleby *v.* Mayor, &c. 15 How. Pr. R. 428; Harlem Gas Company *v.* Mayor, &c. of New York, 33 N. Y. 309; Macey *v.* Titcombe, 19 Ind. 135, 1862; Bonesteel *v.* Mayor, &c. 22 N. Y. 162; Smith *v.* Mayor, &c. 21 How. Pr. R. 1; Nash *v.* St. Paul, 8 Minn. 172, 1863; S. C. 11 Minn. 174; White *v.* New Orleans, 15 La. An. 667. There can be no recovery against a municipal corporation for *extra* work, where the officers who requested it to be done had no authority: Hague *v.* Philadelphia, 48 Pa. St. 527; Bonesteel *v.* Mayor, &c. of New York, 22 N. Y. 162.

Where the charter requires that all work for the city shall be let to the lowest bidder, after a prescribed notice of the time and place of letting shall have been given, and requires that similar notice shall be given where work is re-let, an assessment upon a lot for work done is void, if the contract was let or re-let without notice: Mitchell *v.* Milwaukee, 18 Wis. 92, 1864; see also Wells *v.* Burnham, 20 Wis. 112; Hasbrouck *v.* Milwaukee, 21 Wis. 217, 1866. Owner may, in such a case, restrain the sale; *Ib.* The contract let must be the same that was advertised: Nash *v.* St. Paul, 11 Minn. 174.

[2] Dean *v.* Charlton, 23 Wis. 590, 1869; Hobart *v.* Detroit, 17 Mich. 246, 1868. Dean *v.* Charlton, *supra*, was approved by *Sutherland*, J., in Dolan *v.* Mayor, &c. of New York, 4 Abb. Pr. (N. S.) 397, 1868, and followed by the Supreme Court of Louisiana in Burgess *v.* Jefferson, 21 La. An. 143, 1869, in which it appeared that the contractors with the city had the exclusive right to lay the patented pavement in the state. Liability of city to patentee to pay him "royalty:" Bigelow *v.* Louisville, 3 Fish. Pat. Cas. 602, 1869.

§ 390. Where the municipal authorities were required by law to advertise for sealed proposals for making local improvements, and award the work to the *lowest responsible bidder*, to publish a notice of the award, and to allow the owners of the major part of the frontage to take the contract upon the same terms if they should desire, the court were of opinion that the city authorities had no power to do work which could not be contracted for in this mode, or which the abutters could not themselves perform, and that the award of a contract for *a patented pavement* to the assignee of the patentee, and who had the exclusive right to lay the same, was unauthorized, and the contract void.[1]

§ 391. In an action on a contract for lighting certain streets in New York City with gas, it appeared that the company had, by law, the exclusive right to furnish that part of the city with gas. The charter of the city, however, required all contracts for work and supplies beyond a certain value, which the contract in suit exceeded, to be let to the *lowest bidder*, and the contract not being so let, it was claimed to be void. It was held that since the company had the exclusive right to furnish the gas (which prevented competition), the provision of the charter requiring contracts to be let to the lowest bidder (with a view to secure competition) was inapplicable, and the contract was sustained under the general corporate power of the city to contract for the lighting of its streets.[2]

§ 392. Although notice has been published inviting *proposals* to do public work, yet the contract is incomplete until the proposal is actually accepted, and the corporation inviting the proposals is not, it seems, liable to damages for refusing to accept an offer, even though it be the lowest regular offer made. It is certainly not thus liable where the notice and the proposals, with respect to the amount and form of the security,

[1] Nicholson Pavement Company *v.* Painter, 35 Cal. 699, 1868. This case was decided before Dean *v.* Charlton, *supra*, and the opinion of *Sanderson*, J., in its general scope, sustains the view of the Wisconsin court; and approving of the language of *Field*, C. J., in Zottman's Case, 20 Cal. 102, treats "the *mode* as constituting the measure of the power." *Post*, Chap. XIX.

[2] Harlem Gas Company *v.* Mayor, &c. 33 N. Y. 309.

do not comply with the requirements of the ordinances of the city, and where these provided that contracts should not be executed until laid before the common council.[1]

§ 393. *Contracts of Suretyship.*—A municipal corporation cannot, without legislative authority, become *surety* for another corporation or individual; cannot guaranty the bonds or obligations of another, or make accommodation indorsements. Such an authority cannot be implied or deduced from the general and usual powers conferred upon such corporations. Although such a corporation may have power directly to accomplish a certain object, and itself expend its revenues or money therefor, yet this does not give or include the power to lend its credit to another who may be empowered to effect the same object. Expending money by a city council, as agents or administrators of their constituents, is a very different thing from binding their constituents by a contract of suretyship—"a contract which carries with it a lesion by its very nature."[2]

[1] Smith *v.* Mayor, &c. of New York, 10 N. Y. (6 Seld.) 504, 1853; affirming, S. C. 4 Sandf. S. C. R. 221. "The notice inviting proposals to do the work," says *Willard*, J., delivering the opinion of the Court of Appeals (10 N. Y. 504), "did not, in my judgment, bind the street commissioner of the corporation to accept, at all events, the lowest bid, even though, in all respects, formal. Until the bid is accepted by some act on the part of the corporation, no obligatory contract was created." See, also, People *v.* Croton Aqueduct Board, 26 Barb. 240; State *v.* Directors, &c. 5 Ohio St. 234, 1855; Altemus *v.* Mayor, &c. 6 Duer, 446; Argenti *v.* San Francisco, 16 Cal. 255.

Further as to *lowest bidder*, see chapter on Mandamus, *post.*

[2] Louisiana State Bank *v.* Orleans Navigation Company, 3 La. An. 294, 1848. In this case the municipal corporation was sought to be made liable upon its guaranty of bonds issued by the navigation company, which the mayor, in the name of the municipality, was authorized, by certain resolutions of the council, to indorse. It was held that the council transcended its powers, and the guaranty did not impose any legal obligation upon the municipality. The disability of such corporations, without express power, to enter into contracts of suretyship, is shown in the masterly and exhaustive opinion delivered by *Eustes*, C. J.

A municipal corporation has no *implied power* to lend its credit or make accommodation paper for the benefit of citizens, to enable them to execute private enterprises: Clark *v.* Des Moines, 19 Iowa, 199, 224, 1865; 1 Parsons, N. &. B. 166; Smead *v.* Railroad Company, 11 Ind. 105.

The power to *borrow money* for any public purpose does not authorize the loan of the credit of the city: Chamberlain *v.* Burlington, 19 Iowa, 395; *contra*, Rogers *v.* Burlington, 3 Wall. 654, four judges dissenting. And see

§ 394. *Authorized Contracts.— Rights and Liabilities.*—But with respect to authorized contracts a municipal corporation has the same rights and remedies, and is bound thereby, and may be sued thereon in the same manner as individuals. Thus, if such a corporation, duly empowered, enters into a partnership relation with private individuals with respect to the profits to be derived from a market house, its rights, especially as regards the copartners and the financial administration of the partnership property, are not different from those of an ordinary partner.[1]

§ 395. So where a municipal corporation, in order to secure the erection of gas works, passed an ordinance whereby the gas works and their income were placed in the hands of trustees, for the benefit of those who loaned money to execute the undertaking, *such ordinance is a contract*, and cannot be violated by the city, although it may deem it for the interest of its citizens to do so; nor is it in the power of the legislature to authorize its violation.[2]

§ 396. So where the mayor and council have, by the charter, power to make, in their corporate capacity, all such contracts as they may deem necessary for the welfare of the corporation, they may contract to *sell stock* owned by the city in a private corporation, to enable the city to pay its debts; and

Meyer *v.* Muscatine, 1 Wall. 384. The author cannot but think that power to a corporation to borrow money should not be construed to give the power to loan its credit, but only to borrow money for legitimate and proper municipal objects, as shown by the charter or constituent act of the corporation: See Payne *v.* Brecon, 3 Hurl. & Nor. 572. *Ante*, p. 126, Sec. 81.

[1] New Orleans *v.* Guillotte, 12 La. An. 818, 1857. In New Orleans *v.* St. Louis Church, 11 La. An. 244, 1856, it was contended by the counsel for the city that even if certain resolutions in favor of the defendants allowing them to establish a cemetery within the city amounted to a contract, and though their repeal be not justified by the facts, and a violation of the contract by the city, yet that the latter has the power to violate its contracts, and the defendants have no redress except in an action for damages. But this doctrine was rejected by the court, which declared it to be as "unsound as it is novel," since a liability for damages is "the very opposite of a recognition of a right to violate the contract." *Per Buchanan*, J.

[2] Western Savings Fund Society *v.* Philadelphia, 31 Pa. St. 175, 1854; Same *v.* Same, *Ib.* 185, 1858; *ante*, Chap. IV. p. 86, Sec. 41.

the discretionary power with which the mayor and council are invested cannot, when *bona fide* exercised, be controlled by a court of equity, at the instance of property owners and taxpayers.[1]

§ 397. Power to a city corporation to pave streets at the expense of the owners and recover the amount from them if they fail themselves to pave when required by ordinance, gives the corporation the power to *purchase paving materials* and incur a debt for that purpose; and in a suit by the vendor of such materials against the corporation, it is no defence that the council had not passed an ordinance before they purchased the materials, requiring the owners to pave: this is a matter to which a creditor is not bound to look. The question would be different if the city had sought to make the lot owner liable for the cost of paving; in such case, it must show a strict compliance with the requirements of its charter.[2]

§ 398. *Settlement of Disputed Claims, &c.*—Growing out of its authority to create debts and to incur liabilities, a municipal corporation has power to *settle* disputed claims against it, and an agreement to pay these is not void for want of consideration.[3] If it has obtained a contract which, by mistake or a change of circumstances, it deems to operate oppressively upon the other party, an agreement to make an *additional compensation*, or to modify or annul it, is not invalid for want of consideration.[4] A town may make a contract with a creditor

[1] Semmes *v.* Columbus, 19 Ga. 471, 1856. *Ante*, p. 106, Sec. 58; *post*, chapter on Corporate Property. *Post*, Chap. XX.

[2] Bigelow *v.* Perth Amboy, 1 Dutch. (N. J.) 297, 1855. *Post*, Chap. XIX.

[3] Augusta *v.* Leadbetter, 16 Maine, 45, 1839; Bean *v.* Jay, 23 Maine, 117, 121, 1843; People *v.* Supervisors, 27 Cal. 655; People *v.* Coon, 25 Cal. 648. It may annex conditions to a proposal of settlement, and is not liable unless the conditions are met: Merrill *v.* Dixfield, 30 Maine, 157, 1849.

[4] Bean *v.* Jay, 23 Maine, 117, 121; Meech *v.* Buffalo, 29 N. Y. 198, 1864. Further, as to consideration: Baileyville *v.* Lowell, 20 Maine, 178, 1841; Nelson *v.* Milford, 7 Pick. 18, 1828—valuable opinion by *Parker*, C. J. *Ante*, Chap. IV. p. 90, Sec. 44. The power to sue and be sued gives to a corporation the right to settle or compromise claims. Where a city has a judgment, from which an appeal is about to be taken, the council may, if done in good faith, cancel the judgment on the payment of costs, and such an agreement,

whereby the latter agrees to discount or throw off a portion of his debt, and such an agreement, if founded on a sufficient consideration, will be enforced.[1]

§ 399. *Contracts with Attorneys.*— Resulting also from the power to make contracts, to own property, and to incur liabilities, is the authority in a municipal corporation *to employ an attorney*,[2] and the corporation is bound to pay for services rendered by him, on due employment, without an express vote to that effect.[3] If a corporation attorney, after his term of office has expired, continues in the management of suits in which the corporation is interested, without objection from, and with the knowledge of, the corporation, and of his successor, he may, it has been held, recover for such services.[4]

when executed, is binding upon the corporation: Petersburg *v.* Mappin, 14 Ill. 193, 1852.

Power to submit *to arbitration:* Dix *v.* Dummerston, 19 Vt. 263; Griswold *v.* Stonington, 5 Conn. 367; Canal Company *v.* Swann, 5 How. (U. S.) 83.

[1] Baileyville *v.* Lowell, 20 Maine, 178, 1841. In this case, the town against which the creditor had an execution had the option, and was authorized to raise the money by loan or by assessment; and if in the latter mode, either at once or by instalments. If not raised and paid, the creditor was authorized to cause the property of the inhabitants to be distrained upon his writ. It was held, under these circumstances, that an agreement by the creditor, which was accepted and complied with by the town, that if the town would *at once* assess the amount required, and collect the same, he would abate a portion of his debt, was founded upon a sufficient consideration, and was binding upon him.

[2] Smith *v.* Sacramento, 13 Cal. 531. May employ, unless specially restricted, an attorney in addition to the city attorney: *Ib.* See Hornblower *v.* Dunden, 35 Cal. 644. Compare Clough *v.* Hart, decided by the Supreme Court of Kansas, reported in 11 Am. Law Reg. (N. S.) 95. This case holds that there is *prima facie*, if not absolutely, an implied restriction upon city and county corporations to employ other attorneys to perform the precise duties, as prescribed by law, of the city and county attorneys elected by the people or provided for by incorporating statutes. A municipal corporation which has employed an attorney to file a bill seeking to destroy, by suit, the existence of the corporation itself, cannot apply the corporate funds in payment for such services: Daniel *v.* Mayor, &c. 11 Humph. (Tenn.) 582, 1851.

[3] Langdon *v.* Castleton, 30 Vt. 285, 1858.

[4] *Ib.* See Harrington *v.* School District, 30 Vt. 155; *supra*, Sec. 383, as to implied contracts. Compare Clough *v.* Hart, 11 Am. Law Reg. (N. S.) 95. Compensation of *city attorney:* See Carroll *v.* St. Louis, 12 Mo. 444; Orton *v.*

§ 400. *Contracts for Local Improvements.*— A municipal corporation contracted with a paver to do certain work at a fixed price, of which it was to pay one-third and the owners two-thirds. It was judicially determined that the proprietors were, in law, liable to pay only one-third, and it was held, in an action by the paver against the corporation, that it was a *warrantor* for the remaining one-third, and it was held liable accordingly.[1] But where the charter or constituent act, in reference to improving streets, provides that the city shall be liable to the contractor for so much only of the improvement as is occupied by streets and alleys crossing the same, and that the owners of adjacent lots shall be liable for the rest, the city is not liable for the deficiency, in case the adjacent property does not sell for enough to pay the assessment, and though the owner be a non-resident.[2]

State, 12 Wis. 509; also, chapter on Corporate Officers, *ante.* Liability for attorney's fee under charter or special statutes, see Brady *v.* Supervisors, 2 Sandf. S. C. R. 460, affirmed 10 N. Y. (6 Seld.) 260, 1851, for reasons given by *Oakley,* C. J., in 2 Sandf. 460; Halstead *v.* Mayor, &c. of New York, 3 Comst. 430; State *v.* New Orleans, 20 La. An. 172; Bright *v.* Hewes, 19 La. An. 666; Parker *v.* Williamsburg, 13 How. Pr. 250; Clough *v.* Hart, *supra,* and cases cited by *Valentine,* J.

[1] Tounier *v.* Municipality, 5 La. An. 298. See, also, Cronan *v.* Same, *ib.* 537, where, by the construction of the contract, the city was held liable for the whole expense, the proprietors having refused to make payment. A contractor failing, for *want of power* in a city to be able to get his pay from special assessments, the city was held liable to him, it being regarded as guaranteeing that it possessed the specific powers relied on by the contractor for his compensation: Maher *v.* Chicago, 38 Ill. 266, 1865. But see Chicago *v.* People, 48 Ill. 416, where the first case is explained and distinguished. See, also, Reilly *v.* Philadelphia, 60 Pa. St. 467. Right of contractor to sue the corporation where, in consequence of its neglect, it would be nugatory to proceed against the owners or the property: See Michel *v.* Police Jury, 9 La. An. 67; Newcomb *v.* Same, 4 *ib.* 233; Michel *v.* Same, 3 *ib.* 123. Compare Reock *v.* Newark, 33 N. J. Law, 129. Further, as to *local improvements,* see Chap. XIX. *post. Supra,* Secs. 383, 389.

[2] New All any *v.* Sweeney (construing general Towns and Cities Act), 13 Ind. 245, 1859; Lucas *v.* San Francisco, 7 Cal. 463; Lovell *v.* St. Paul, 10 Minn. 290. Contracts with municipal corporations are construed with reference to the chartered or corporate powers of the city: 13 Ind. 245, *supra.* If the *city corporation agrees with the contractor to collect* the assessments from the abutting owners, a failure to do so will render it liable: Morgan *v.* Dubuque, 28 Iowa, 575, 1870. See Beard *v.* Brooklyn, 31 Barb. 142.

§ 401. A city charter required the consent of a majority of property owners to make certain improvements, which, when made, were chargeable upon the *adjacent property*. An ordinance provided that contractors doing such work should look to the adjacent property, and not to the city, for their pay. Under these circumstances, the city entered into a contract with the plaintiff to grade a certain street, the plaintiff agreeing that he would receive his pay from the adjoining property. The plaintiff performed the work, and, inasmuch as the adjacent owners had never given their consent to the making of the improvement, he sued the city on the *contract*, to recover for the work done; and it was held that the action could not be maintained.[1]

§ 402. It has been asserted that where the expense of making a local improvement is not to be raised by a general tax, but solely upon the property benefited, that a *failure of the*

[1] Leavenworth *v.* Rankin, 2 Kansas, 357, 1864; Swift *v.* Williamsburg, 24 Barb. 427; Goodrich *v.* Detroit, 12 Mich. 279; Johnson *v.* Common Council, 16 Ind. 227; New Albany *v.* Sweeney, 13 Ind. 245.

Where the *contractor has agreed* to look for payment to the lot benefited, or to the owner, he cannot hold the city, unless it may be in cases where the whole proceeding is void, or the city neglects its duty: Kearney *v.* Covington, 1 Met. (Ky.) 339; Smith *v.* Milwaukee, 18 Wis. 63, 1864; Finney *v.* Oshkosh, *ib.* 309; Chicago *v.* People, 48 Ill. 416; Ruppert *v.* Baltimore, 23 Md. 184; Louisville *v.* Henderson, 5 Bush (Ky.), 515, 1869.

A city advertised for proposals to do certain public work, and the plaintiff made proposals, which were accepted, without qualification, by an entry on city records; and it was decided that the statement in the published notice, "the expense of the work to be assessed," &c., was part of the contract, no other provision for payment having been made, and that the plaintiff could not maintain an action against the city until after the assessment and collection of his compensation, or until it or its officers failed to proceed with reasonable diligence, after the expense of the work was ascertained, to make and collect an assessment, and to pay over money thus collected: Hunt *v.* Utica, 18 N. Y. 442, 1858.

Further, as to the *rights and remedies of the contractor;* of the property owner, and the liabilities of the municipal corporation: Smith *v.* Milwaukee, 18 Wis. 63; Foote *v.* Same, *ib.* 270; Bond *v.* Newark, 19 N. J. Eq. 376; Fletcher *v.* Oshkosh, 18 Wis. 228, 232; Palmer *v.* Stump, 29 Ind. 329; McSpedon *v.* New York, 7 Bosw. 601; Reilly *v.* Philadelphia, 60 Pa. St. 467; Whalen *v.* La Crosse, 16 Wis. 271; Flournoy *v.* Jeffersonville, 17 Ind. 169; Creighton *v.* Toledo, 18 Ohio St. 447; Goodrich *v.* Detroit, 12 Mich. 279; Buffalo *v.* Halloway, 7 N. Y. (3 Seld.) 493; Storrs *v.* Utica, 17 N. Y. 104. *Post*, chapter on Taxation and Local Improvements. *Supra*, Sec. 384.

corporation, though it is only the agent of the owners to be assessed, *to discharge its duty*, by making the necessary assessment, or its unreasonable delay in collecting and paying over the money, gives the contractor a right to recover his compensation in an action against the corporation.[1] The right to a general judgment should, in our opinion, be limited, in any event, to cases where the corporation can afterwards reimburse itself by an assessment. For, why should all be taxed for the failure of the council to do its duty in a case where the contractor has a plain remedy, by *mandamus*, to compel the council to make the necessary assessment and proceed in the collection thereof with the requisite diligence?

§ 403. *Same.—Corporate Control by Stipulation.*—An agreement by a contractor to execute a public improvement under the general direction and supervision of a committee of a city, makes such committee — acting reasonably, and honestly, not arbitrarily and capriciously — exclusively the judge, not only as to materials and manner, but also as to the time of doing the work.[2] But where a written contract has been entered into between a municipal corporation and a contractor, a general provision of an ordinance that the work shall be done under the directions of certain officers, confers no authority upon them essentially to change or modify the provisions of the contract.[3] If, in a contract for a public work, the corpora-

[1] Beard *v.* Brooklyn, 31 Barb. 142, 1860. See Goodrich *v.* Detroit, 12 Mich. 279, 1864; Cumming *v.* Mayor, &c. of Brooklyn, 11 Paige, 596, 1845; Baker *v.* Utica, 19 N. Y. (5 Smith) 326, 1859; Green *v.* Mayor, &c. of New York, 5 Abb. Pr. Rep. 503. See, generally, as to assessments for public works: Doughty *v.* Hope, 3 Denio, 249; Manice *v.* Mayor, 8 N. Y. 120; People *v.* Mayor, &c. of New York, 5 Barb. 43; 8 Barb. 95; 23 Barb. 390. In principle sustaining the view suggested in the text: Reock *v.* Newark, 33 N. J. Law, 129. And see opinion of *Field*, C. J., in Argenti *v.* San Francisco, 16 Cal. 255, 282, 1860. *Post*, Chap. XX. on Mandamus.

[2] Chapman *v.* Lowell, 4 Cush. 378, 1849, relating to drains in the streets of the city. As to power of chancery to correct mistake of the engineer or other person whose decision both parties to the contract have agreed to abide by, see Railroad Company *v.* Veeder, 17 Ohio, 385.

[3] Bonesteel *v.* Mayor, &c. of New York, 22 N. Y. 162, 1860. But the authority of the corporation may be implied from *its* having by its own act rendered extra materials necessary to conform the work to the conditions of the contract: Messenger *v.* Buffalo, 21 N. Y. 196, 1860.

tion employer reserves the right to make alterations in the form, dimensions, or materials of the work, the contractor is bound by any such alterations made in good faith; but such a clause does not authorize the employer to annul the agreement, or to stop the work in an unfinished state.[1]

404. *Evidences of Indebtedness — Negotiable Bonds.*—We have elsewhere discussed the power of the legislature to authorize the issue of municipal bonds in aid of railway and other like enterprises,[2] and have also considered the express and implied power of municipal corporations to borrow money and issue obligations therefor.[3] It appropriately belongs to this place, however, to notice more at length the *different kinds of corporate evidences of debt*, and the rights and remedies of the holders thereof, and to this general subject will the residue of the present chapter be devoted.

§ 405. Bonds issued by municipal corporations on time, negotiable in form, and for sale in the market, under *express authority* from the legislature, *are negotiable*, with all the qualities and incidents of negotiability. Such securities are made to raise money by their sale, and this object would be defeated if they were subject to equities (where the power to issue exists) in the hands of *bona fide* holders.[4]

[1] Clark *v.* Mayor, &c. of New York, 4 Comst. 338, 1850. Remedy of contractor, and measure of damages in such a case, considered: *Ib.* It is held, in Vermont, that a person who has contracted with the proper town officers to build a road, cannot proceed with his contract after notice of an appeal and recover of the town therefor. This decision is based upon a construction of the statute of that state by which the appeal is intended to stay or suspend all proceedings toward building the road, and the contractor was bound to take his contract, subject to the contingency of the appeal allowed by law: Taft *v.* Pittsford, 28 Vt. (Wms.) 286, 1856.

[2] *Ante*, p. 144, *et seq.*

[3] *Ante*, p. 126, *et seq.*

[4] Mercer County *v.* Hacket, 1 Wall. 83, 1863 (denying Diamond *v.* Laurence County, 37 Pa. St. 358); Meyer *v.* Muscatine, 1 Wall. 384; Gelpcke *v.* Dubuque, *ib.* 175; Moran *v.* Miami County, 2 Black. 722, 1862; Clapp *v.* Cedar County, 5 Iowa, 15; Morris Canal Company *v.* Fisher, 1 Stockt. Ch. 667, 1855; Craig *v.* Vicksburg, 31 Miss. 216; Jackson *v.* Railroad Company, 2 Am. Law Reg. (N. S.) 585; S. C. *ib.* 748, and note of Judge *Redfield*; Chapin *v.* Railroad Company, 8 Gray, 575; Clark *v.* Janesville, 10 Wis. 136; Gould

§ 406. *Ordinary Corporation Orders or Warrants.*—But *ordinary city, county, and town orders or warrants* are, in some respects, *different* from bonds of the character just mentioned, and in the author's judgment, the better opinion is, that there is no *implied* power in the officers of a town, county, or city corporation to issue warrants or orders which shall be free from equities in the hands of holders; that the existence of such a power is not necessary as an incident to those ordinarily granted or to carry out the purposes of the corporation, and would be attended with abuse and fraught with danger. Ordinary warrants or orders, negotiable in form, may be made by the proper officers, and in many of the states such instruments may be transferred by delivery or indorsement, and the holder sue thereon in his own name, yet they are not commercial or negotiable paper in the hands of innocent holders so as to exclude inquiry into the legality of their issue or preclude defences thereto.[1] Ordinary warrants drawn by one officer on

v. Sterling, 23 N. Y. 464; S. C. 1 Am. Law Reg. (N. S.) 290, and note; Clark *v.* Des Moines, 199, 213, and cases cited; White *v.* Railroad Company, 21 How. 575; Bank *v.* Railroad Company, 3 Kern. 599; S. C. 4 Duer, 480; Aurora *v.* West, 22 Ind. 88; Commissioners *v.* Bright, 18 Ind. 93; Barrett *v.* Schuyler County, 44 Mo. 197; De Voss *v.* Richmond, 18 Gratt. 338; 7 Am. Law Reg. (N. S.) 589; State *v.* Madison, 7 Wis. 688; Clark *v.* Janesville, 10 Wis. 136, 1859; Maddox *v.* Graham, 2 Met. (Ky.) 56, 1859.

Coupons attached to such bonds are negotiable, and the holder may sue thereon in his own name without being interested in or producing the bonds to which they were originally attached: Thompson *v.* Lee County, 3 Wall. 327, 1865; Murray *v.* Lardner, 2 Wall. 110, 1864; Knox County *v.* Aspinwall, 21 How. 539, 1858; Johnson *v.* Stark County, 24 Ill. 75; City *v.* Lamson, 9 Wall. 478, 1869; Railroad Company *v.* Otoe County, 1 Dillon, C. C. R. 338. An action on a coupon not barred in less time than the bond to which it was originally attached; City *v.* Lamson, *supra*. *How declared on:* Ring *v.* County, 6 Iowa, 265; Railroad Company *v.* Otoe County, *supra;* Wiley *v.* Board, &c. 11 Minn. 371. *Effect of judgment* for interest as an estoppel in a subsequent suit for interest or principal: Bank *v.* Navigation Company, 3 La. An. 294. As to interest, *infra*, Sec. 414.

Municipal corporations may plead the *statute of limitations* in actions against them on their bonds payable at a fixed time: De Cordova *v.* Galveston, 4 Texas, 470, 1849; see Underhill *v.* Trustees, 17 Cal. 172.

[1] Emery *v.* Mariaville, 56 Maine, 315; Clark *v.* Des Moines, 19 Iowa, 199, 211–214, 1865, and cases cited; Clark *v.* Polk County, *ib.* 248; People *v.* County, 11 Cal. 170, 1858; Sturtevant *v.* Liberty, 46 Maine, 457; Smith *v.* Cheshire, 13 Gray, 318, 1859; Andover *v.* Grafton, 7 N. H. 298, 1834; compare, however, Bank *v.* Farmington, 41 N. H. 32; Dalrymple *v.* Whitting-

another officer of the same corporation are not bills of exchange, as such bills involve the idea of two parties, but are orders by the corporation on itself—mere directions to the treasurer to pay the amount to the bearer.[1]

§ 407. Banking and trading corporations have the *implied or incidental power* to make *negotiable paper*;[2] and the same rule

ham, 26 Vt. 345; Inhabitants *v.* Weir, 9 Ind. 224, 1857; School District *v.* Thompson, 5 Minn. 280, 1861; S. P. Goodnow *v.* Commissioners, 11 *ib.* 31, 1865; Hyde *v.* Franklin, 27 Vt. 185, 1855; approved, Taft *v.* Pittsford, 28 *ib.* 286; Halstead *v.* Mayor, &c. 3 Comst. 430; S. C. 5 Barb. 218; The Floyd Acceptances, 7 Wall. 666, and reasoning of Mr. Justice *Miller;* People *v.* Gray, 23 Cal. 125; *Ib.* 447. Warrants, duly signed and sealed, are *prima facie* valid, but open to defences: Commissioners *v.* Keller, 6 Kansas, 510; Commissioners *v.* Day, 19 Ind. 540, 1862. *Infra*, Sec. 411.

Transferee or holder may sue in his own name: Emery *v.* Mariaville, 56 Maine, 315; Crawford County *v.* Wilson, 2 Eng. (Ark.) 214; Clark *v.* Des Moines, 19 Iowa, 199; Campbell *v.* Polk County, 3 Iowa, 467; Clark *v.* Polk County, 19 Iowa, 248. Otherwise in Massachusetts: Smith *v.* Cheshire, 13 Gray, 318, treating a town order, payable to bearer, as a mere chose in action which could not be enforced in the name of an assignee. In many of the states, "the real party in interest" may sue in his own name. In Vermont, as to right of holder of town and county orders to sue in his own name, see Dalrymple *v.* Whittingham, 26 Vt. 345; compare, Taft *v.* Pittsford, 28 Vt. 286, 289; Hyde *v.* Franklin, 27 Vt. 185. *Right of indorsee to sue or enforce by mandamus in his own name:* Kelly *v.* Mayor, &c. 4 Hill, 263; Clark *v.* School District, 3 Rh. Is. 199; Moss *v.* Oakley, 2 Hill (N. Y.), 265; Commissioners *v.* Day, 19 Ind. 450; Dively *v.* Cedar Falls, 21 Iowa 565; Justices *v.* Orr, 12 Geo. 137. *Post*, Chap. XX.

[1] Miller *v.* Thompson, 3 Man. & Gr. 576; Fairchild *v.* Railroad Company, 15 N. Y. 337; Bulls *v.* Sims, 23 N. Y. 570, 572; Clark *v.* Polk County, 19 Iowa, 247; Harvey *v.* W. P. S. Co. 1 Doug. (Mich.) 193; Dana *v.* San Francisco, 19 Cal. 486; Justices *v.* Orr, 12 Geo. 137. Municipal certificates of indebtedness are not "*bills of credit*" within the meaning of the prohibition (Art. 1, Sec. 10) of the National Constitution: Baltimore *v.* Board of Police, 15 Md. 376, 1859. As *a county warrant* is an instrument by which the money, property, or rights of a county be affected, it is such an one as *may be forged:* State *v.* Fenley, 18 Mo. 445, 1853. Requisites of indictment in such a case: *Ib.*

Liability as respects *scrip issued to circulate as money:* Thomas *v.* Richmond, 12 Wall. 349, 1870, and in which the city was held not to be liable. See, on this subject, Allegheny City *v.* McClurkan, 14 Pa. St. 81, 1850; Jones *v.* Little Rock, 25 Ark. 301; Clark *v.* Des Moines, 19 Iowa, 199, 1865: Dively *v.* Cedar Falls, 21 Iowa, 565; S. C. 27 *ib.* 227.

[2] McCullough *v.* Moss, 5 Denio, 567; Straus *v.* Eagle Insurance Company, 5 Ohio St. 59; Mott *v.* Hicks, 1 Cow. 513; Attorney General *v.* Insurance Company, 9 Paige, 470; 2 Kent Com. 299; 1 Parsons N. & B. 165; Clark *v.* Des Moines, 19 Iowa, 212. *Ante*, pp. 126–128.

has, in some of the cases, been applied to municipal corporations. The ordinary warrants of such corporations, it is clear, do not cut off equities, and it is at least doubtful how far they have the *implied power* to make paper which shall have this effect. The adjudged cases on this point are conflicting.[1]

[1] Kelly *v.* Mayor, &c. 4 Hill (N. Y.) 263; Clark *v.* Des Moines, 19 Iowa, 199, 213; Carne *v.* Brigham, 39 Maine, 39; Clarke *v.* School District, 3 Rh. Is. 199; Goodman *v.* Commissioners, 11 Minn. 31. *Ante*, Secs. 81–83.

The ground has been broadly taken, that for debts and obligations lawfully created, any corporation, public as well as private, has the implied authority, unless prohibited by statute, charter, or by-law, to evidence the same by the execution of a bill, note, bond, or other contract, and to secure the same by a mortgage, pledge, or other proper disposition of its property; that power to contract a debt carries with it the power to give a suitable acknowledgement of it; and there is no rule of law in the absence of a statute limiting the length of the credit: Municipality *v.* McDonough, 2 Rob. (La.) 242, 250, 1842; Barry *v.* Merchants' Express Company, 1 Sandf. Ch. 280; cited with approval in Curtis *v.* Leavitt, 15 N. Y. 9, 62, and in Smith *v.* Law, 21 N. Y. 296, 299, 1860; Bank, &c. *v.* Chilicothe, 7 Ohio, part II. 31, 1836; Ketchum *v.* Buffalo, 14 N. Y. 356, 1856, market house bonds given on twenty-five years' time held valid, and see cases cited on page 375, by *Wright*, J.; Douglass *v.* Virginia City, 5 Nev. 147. As to express power to issue bonds, &c., see also Bank of Rome *v.* Village of Rome, 18 N. Y. 38, 44, and cases cited; Mills *v.* Gleason, 8 Am. Law Reg. 693; Louisiana State Bank *v.* Orleans Navigation Company, 3 La. An. 294. State bonds negotiable: Delafield *v.* Illinois, 2 Hill, 159. Power "to borrow money" held to include power to issue negotiable bonds or other usual securities to the lender: Commonwealth *v.* Pittsburg, 34 Pa. St. 496, 511. Board of Supervisors of a county have not power to issue bill of exchange: Canal Bank *v.* Supervisors, &c. 5 Denio, 517, 1848. Nor have village trustees: Lake *v.* Trustees, 4 Denio, 520. Corporate city has the power: Kelly *v.* Mayor, 4 Hill, 263; compare Clark *v.* Des Moines, 19 Iowa, 199, 213. In Inhabitants, &c. *v.* Weir, 9 Ind. 224, 1857, an action against a congressional township upon a promissory note made by the trustees, the court, *per Stuart*, J. says: "There is no power to make notes conferred by the act of 1841. That act was the charter under which they acted. The trustees, as a corporation, had no power but such as that act expressly conferred, and such as might arise by implication, or essential to the exercise of those granted. Such a power is always expressed even in bank charters. In so limited a corporation as a congressional township, the power to make promissory notes could hardly be implied. The case at bar cannot easily be distinguished in principle from *McClure* v. *Bennett*, 1 Blackf. 189, and *Mears* v. *Graham*, 8 *ib.* 144."

Statutory power "to issue county orders" gives no authority to issue negotiable bonds payable at a future day, with interest coupons attached. The difference is substantial: Goodnow *v.* Commissioners, 11 Minn. 31, 1865; County Commissioners *v.* Carter, 2 Kansas, 115, 1860; Hull *v.* County,

§ 408. *Liability of Indorser.*— Warrants or orders of a municipal corporation for the unconditional payment of money to a person named, or order, or bearer, have the character of negotiable paper, so far, at least, as to render parties indorsing them *liable as indorsers.*[1]

12 Iowa, 142. Statutory form of county warrants held to be directory, and a mere departure from this form is no defence to an action on the warrant: Young *v.* Camden County, 19 Mo. 309, 1854. Authority to a city to subscribe for stock to be paid for by "certificates of loan," authorizes it to issue negotiable bonds with coupons attached — such "certificates of loan" and "bonds" being considered identical: Amey *v.* Allegheny City, 24 How. (U. S.) 364, 1860; see Commonwealth *v.* Pittsburg (power "to borrow money") 34 Pa. St. 496, 511; Same *v.* Same, 41 Pa. St. 278. Power by public corporations to issue negotiable bonds may be inferred from the power to subscribe for stock and to make payment for it: Curtis *v.* Butler County, 24 How. (U. S.) 435; Bushnell *v.* Beloit, 10 Wis. 195. Express legislative authority to a city to subscribe for stock in a railroad "as fully as any individual," authorizes the issue, by the city, of negotiable bonds in payment therefor: Seybert *v.* Pittsburg, 1 Wall. (U. S.) 272, 1863; approving, Commonwealth *v.* Same, 41 Pa. St. 278. By resolution, the council authorized the mayor to borrow money of a bank and execute the *note* of the corporation therefor, instead of which he executed the *bond* of the corporation under the seal of the corporation. In an action on this bond by the payee, it was held that the corporation could plead *non est factum*, since the act of the mayor in executing a writing obligatory instead of a note, did not bind the corporation: Little Rock *v.* State Bank, 3 Eng. (Ark.) 227; see Damon *v.* Granby, 2 Pick. 345; Randall *v.* Van Vechten, 19 Johns. 60; Bank *v.* Patterson, 7 Cranch, 229; Head *v.* Insurance Company, 2 *ib.* 127. Where towns were required "to purchase" liquors, and the selectmen were indictable if they failed to make provision for executing the law, it was held that a town might give a negotiable note for liquors actually purchased, and that the town could not defend against it in the hands of a *bona fide* holder on the ground that the liquors were sold in violation of the law of the state: Bank *v.* Farmington, 41 N. H. 32, 1860. What an indorsee is bound to inquire about, stated: *Ib.* 42.

[1] Bull *v.* Sims, 23 N. Y. 570, 1861. In this case the action was by an indorsee against the defendant as indorser of the following instrument: —

"MILWAUKEE, Aug. 1, 1859.

"The treasurer will, on or before the 1st day of February next, pay to the order of E. Sims, fifty dollars, *out of any funds belonging to the city not before specially appropriated*, the same having been this day allowed for dredging, and chargeable to the general city fund.

"R. R. LYNCH, *Clerk.* H. L. PAGE, *Mayor.*"

It was held that the defendant incurred the responsibility of an indorser of negotiable paper, and that the plaintiff was not bound to show the existence of sufficient funds in the city treasury to pay the warrants, and not

§ 409. *Payment and Cancellation.*—Payment by the treasurer or proper officer of a municipal corporation of its orders or warrants *ipso facto extinguishes* them. If lent, re-issued, or put into circulation again by the officer, after he has once obtained credit therefor, they are not valid securities, not even, it seems, in the hands of an innocent holder.[1]

§ 410. *Rights and Remedies of holder.*—A creditor of a town is not bound to receive an order on the treasurer, but may sue upon his original cause of action.[2] But if he does receive it he is charged with the duty of presenting it to the treasurer, upon whom it is drawn, or of alleging facts which excuse presentment, before he can maintain an action upon it. As such an order is, in effect, an order by the debtor on himself, if presented and payment be refused, the town is liable instantly, and without notice of non-payment.[3]

especially appropriated at the time of its maturity. Campbell *v.* Polk County, 3 Iowa, 467; Hodges *v.* Shuler, 22 N. Y. 114; Fairchild *v.* Ogdenburgh, &c. Railroad Company, 15 N. Y. 337. Compare as to liability of indorser: Keller *v.* Hicks, 22 Cal. 457.

[1] Canal Bank *v.* Supervisors, 5 Denio (N. Y.) 517, 1848. In this case it was held that where, without any fraudulent intent, the holder of valid county orders exchanged them with the treasurer for others which were in fact paid, but which had never been allowed him in his accounts, the debt represented by the valid orders was not extinguished, and was a sufficient consideration to support a settlement with the county allowing it. As to illegal orders in hands of *bona fide* holder: Halstead *v.* the Mayor, &c. of New York, 3 Comst. 430; affirming, S. C. 5 Barb. 218.

[2] Benson *v.* Carmel, 8 Greenl. 112; Willey *v.* Greenfield, 30 Maine, 452, 1849.

[3] Varner *v.* Nobleborough, 2 Greenl. 121, where *Mellen*, C. J. says: "No sound reason can be given why a town should be subjected to the perplexity of costs of an action before the payee of an order will do his duty and request the payment." "There is an implied engagement to conform to established usage, and present the order for payment." Benson *v.* Carmel, *supra;* Pease *v.* Cornish, 19 Maine (1 Appl.), 191, 1841. As to mode of presentment: Steel *v.* Davis County, 2 G. Greene (Iowa), 469; Campbell *v.* Polk County, 3 Iowa, 467. Where the payee has accepted county orders for a debt against the county, and has parted with such orders, he cannot sue the county for the original debt: Crawford County *v.* Wilson, 2 Eng. (Ark.) 214, 1846. See Allison *v.* Juniata County, 50 Pa. St. 351. An unpaid and dishonored warrant on the corporation treasurer is not, *prima facie*, at least, an extinguishment or novation of the original debt: Goldschmidt *v.* New Orleans, 5 La. An. 436; Short *v.* New Orleans, 4 *Ib.* 281.

§ 411. County and city orders signed by the proper officers *are, prima facie, binding and legal.* These officers will be presumed to have done their duty. Such orders make a *prima facie* cause of action. Impeachment must come from the defendant.[1]

§ 412. *Defences.*—A municipal corporation is not estopped, after a warrant upon its treasury has been issued, to set up the defence of *ultra vires, or fraud, or want, or failure of consideration.*[2] And it may maintain a bill in equity to cancel warrants illegally issued.[3]

[1] Commissioners *v.* Day, 19 Ind. 450, 1862; 9 *ib.* 359; Commissioners *v.* Keller, 6 Kansas, 510, 1870; Clark *v.* Des Moines, 19 Iowa, 211, 1865. Such debts "do not stand on the footing of those contracted under a special *conditional grant of power:*" 19 Ind. 450; People *v.* Mead, 24 N. Y. 114. *Ante,* Chap. IX. p. 190, Sec. 152; *supra,* Sec. 406.

[2] Thomas *v.* Richmond (scrip to circulate as money), 12 Wall. 349, 1870; Webster County *v.* Taylor, 19 Iowa, 117, 1865; Clark *v.* Des Moines, *ib.* 199; Clark *v.* Polk County, *ib.* 248; Hodges *v.* Buffalo, 2 Denio, 110; Halstead *v.* Mayor, &c. 3 N. Y. 430; Brown *v.* Utica, 2 Barb. 104; Anthony *v.* Inhabitants, &c. 1 Met. 286. The allowance of a claim by a county board is not final and conclusive. Such allowance is *prima facie* evidence of the correctness of the claim, "but," says *Kingman,* C. J., "the settlement of an account by the county board is not more sacred than a settlement made by individuals." The court therefore held, and properly so, that the allowance of a claim by the county was not an *adjudication* in the sense that it would conclude the county as to the amount allowed when sued upon the warrant drawn in pursuance of such allowance: Commissioners *v.* Keller, 6 Kansas, 510, 1870. *Post,* Chap. XXIII. Warrants may, it seems, be *usurious:* Clark *v.* Des Moines, *supra.*

[3] Pulaski County *v.* Lincoln, 4 Eng. (Ark.) 320, 1849; Webster County *v.* Taylor 19 Iowa, 117, 1865; Trustees *v.* Cherry, 8 Ohio St. 564, 1858. In Mississippi a board known as the board of police are authorized by law to audit and allow, upon due proof, all claims against the county, and counties in that state cannot be sued directly. The action of the board in allowing claims for matters of county charge, and in ordering warrants to issue therefor is final and conclusive on the county, in the absence of fraud, until it is reversed or vacated: Carroll *v.* Board, &c. 28 Miss. (6 Cush.) 38. 1854. *Issuing new orders for old:* Effect of, see Clark *v.* Des Moines, 19 Iowa, 199; Canal Bank *v.* Supervisors, 5 Denio, 517; Lake *v.* Trustees, 4 *ib.* 520. On warrants or orders the *statute of limitations* does not begin to run until payment is denied: Justices *v.* Orr, 12 Ga. 137, 1852. See Carroll *v.* Board, &c. 28 Miss. 38; De Cordova *v.* Galveston (bonds), 4 Texas, 470; City *v.* Lamson (coupons), 9 Wall. 478. *Supra,* 406, note.

§ 413. *Payable out of a particular fund.*—If by law a particular claim is to be paid out of a *special fund*, a warrant or order issued therefor should be made payable out of such fund; if made payable from the treasury generally by the officers issuing it, the corporation is not bound by their act.[1] An order or warrant concluding with the words "and charge the same to the account of Union Avenue," is payable out of the particular fund indicated, and is not a claim against the corporation.[2] But the distinction must be observed between orders payable out of a particular fund, and those which evidence a general corporate liability but are directed to be charged to a particular account.[3]

§ 414. *Interest on Corporate Indebtedness.*—The rule in respect to interest on debts against municipal corporations, does not ordinarily differ from that which applies to individuals.[4]

[1] County Commissioners *v.* Cox, 1 Ind. 403, 1855. *Post*, Chap. XX.

[2] Lake *v.* Trustees, &c. 4 Denio (N. Y.), 520, 1847, remedy of holder discussed; distinguished from Kelly *v.* Mayor, &c. of Brooklyn, 4 Hill, 263; and see McCullough *v.* Mayor, &c. 23 Wend. 458; Cuyler *v.* Rochester, 12 Wend. 165; Argenti *v.* San Francisco, 16 Cal. 255, and note remarks of *Field*, C. J.; Martin *v.* San Francisco, *ib.* 285. An instrument in this form:

"DECEMBER 31, 1836.

"*City of Brooklyn, ss:* To the City Treasurer: Pay A. L. or order, $1500, for award No. 7, and charge to Bedford road assessment, &c.

"J. T., *Mayor.*
"A. G. S., *Clerk.*"

Held, 1st. Negotiable, and not payable out of any special fund. 2nd. Corporation was not discharged by failure to present and give notice, no damage or injury being sustained in consequence of the omission: Kelly *v.* Mayor, &c. 4 Hill, (N. Y.) 263, 1843; Steel *v.* Davis County, 2 G. Greene (Iowa), 469; Campbell *v.* Polk County, 3 Iowa, 467.

[3] Clark *v.* Des Moines, 19 Iowa, 199, 222; Edwards on Bills, 143; Pease *v.* Cornish, 19 Maine, 191; Campbell *v.* Polk County, 3 Iowa, 467; Commissioners *v.* Mason, 9 Ind. 97; Bayergue *v.* San Francisco, 1 McAll. C. C. R. 175; Bull *v.* Sims, 23 N. Y. 570; Montague *v.* Horan, 12 Wis. 599. In an action on a county order payable out of the three per cent fund, "as fast as the same shall accrue to the county," it *must be alleged* that the county has received money from the specific fund named applicable to the order in suit, or that the order was fraudulently drawn upon a fund in which the county had no assets: Commissioners *v.* Mason, 9 Ind. 97, 1857. See chapter on *Mandamus, post.*

[4] Langdon *v.* Castleton, 30 Vt. 285, 1858 (action on book account).

Under the Missouri statute, providing generally that creditors shall be allowed interest at the rate of six per cent per annum, &c., it is held that county warrants draw interest after presentment to the treasury and refusal of payment by the treasurer, the court regarding the general statute as to interest broad enough to embrace all debtors — counties as well as individuals.[1] But in Illinois it is held that the debts of municipal corporations are payable at the treasury of the body; that interest on coupons — that is, interest on interest — cannot be recovered, unless there be a special agreement to that effect, since such corporations are not named in the act regulating interest. The court remarks: "Whatever power these corporations may possess to contract for the payment of interest, in the absence of any express legislation on the subject, we are of opinion that their indebtedness, in the absence of such agreement, does not bear interest. If such instruments (coupons) could in any event draw interest without an express agreement, it could only be after a proper demand of payment. Until a demand is made, such a body is not in default. They are not like individuals — bound to seek their creditors to make payment of their indebtedness."[2]

§ 415. *Railroad Aid Bonds.— Course of Decision in the United States Supreme Court.*— There has been much controversy, as heretofore shown, in the different states concerning the *constitutional power* of the legislature to authorize municipal and public corporations to subscribe for stock in private railway

[1] Robbins *v.* County Court, 3 Mo. 57, 1831. In Iowa, coupons on county and city bonds are held to *draw interest:* Rogers *v.* Lee County, 1 Dillon, C. C. R. 529. See Railroad Company *v.* Evansville, 15 Ind. 395; Hollingsworth *v.* Detroit, 3 McLean, 472; Pruyn *v.* Milwaukee, 18 Wis. 367. If, under authority to issue bonds with eight per cent interest, bonds be issued drawing twelve per cent, they are valid and bear interest at the statutory rate: Quincy *v.* Warfield, 25 Ill. 317. May be made *payable out of the state:* Meyer *v.* Muscatine, 1 Wall. 384; Maddox *v.* Graham, 2 Met. (Ky.) 56.

[2] Pekin *v.* Reynolds, 31 Ill. 529, 1863; People *v.* Tazewell County, 22 Ill. 147; Johnson *v.* Stark County, 24 Ill. 75. In Madison County *v.* Bartlett, 1 Scam. (Ill.) 67, it was held that counties were not liable to pay interest on their orders or warrants, not being named in the statute regulating interest, and the common law not allowing it to be recovered. So in Pennsylvania: Allison *v.* County, 50 Pa. St. 351. In that state a county is not suable on its warrants, but suit must be on original claim: *Ib. Post*, Chap. XX.

companies and to levy and collect taxes to pay indebtedness thus created.[1] Respecting *negotiable bonds* issued under legislative authority by municipalities for such and kindred purposes, when in the hands of *bona fide* holders, the Supreme Court of the United States, influenced, doubtless, by a keen sense of the injustice and odium of repudiation, has at all times displayed a strong determination effectually to enforce their payment.

§ 416. Accordingly, it has refused to follow the subsequent decisions of the state court against the validity of such bonds, in cases where the prior ruling of the state court had been in favor of the power to issue them;[2] it has adopted liberal constructions of statutes and charters authorizing the creation of

[1] *Ante*, Chap. VI. p. 144. Since the decision of the Supreme Court of Michigan, in the People *v.* Township Board of Salem, 20 Mich. 452, S. C. 9 Am. Law Reg. (N. S.) 487, before mentioned (*ante*, p. 146, Sec. 105), the question arose in the United States Circuit Court for the western district of Michigan, in an action on municipal railway aid bonds, whether the federal court was *concluded* by the judgment of the Supreme Court of the state, and, if not, whether the holder of bonds, issued in full compliance with the statute, could recover thereon. *Emmons*, Circuit Judge, in an elaborate opinion, holds, as to bonds issued *before* the decision of the Supreme Court of the state, that the federal courts are not concluded thereby, and that the constitutional power of the legislature to authorize their issue, in the absence of special limitations, must be regarded as settled, at least as respects the federal tribunals. The opinion displays great research and learning, and will be found reported under the name of Talcott *v.* Township of Pine Grove, Vol. I. Bench and Bar (N. S.), 50, 1872. The Supreme Court of Michigan adheres to its opinion on this subject in the later case of the People *v.* State Treasurer, not yet reported.

In Gilchrist *v.* Little Rock, 1 Dillon, C. C. R. 261, and in Ranlett *v.* Leavenworth, *ib.* 263, the Circuit Court of the United States for the eighth circuit, prior to any decisions of the Supreme Courts of the states of Arkansas and Kansas as to the constitutional validity of municipal railway aid bonds, declined to pronounce such bonds in the hands of *bona fide* holders to be void for the want of authority in the state legislature to authorize their issue. History of the Iowa municipal bond cases: King *v.* Wilson, 1 Dillon, C. C. R. 555.

[2] Gelpcke *v.* Dubuque, 1 Wall. 175, 1865; Havemeyer *v.* Iowa County, 3 *ib.* 294; Thompson *v.* Lee County, *ib.* 327; Lee County *v.* Rogers, 7 *ib.* 181; Butz *v.* Muscatine, 9 *ib.* 571; City *v.* Lamson, 9 Wall. 477; Campbell *v.* Kenosha, 5 Wall. 194, 1866. Read last two cases in connection with Foster *v.* Kenosha, 12 Wis. 616, which, in effect, is overruled or disregarded.

such debts;[1] it has given no favor to defences based upon mere irregularities in the issue of the bonds or non-compliance with preliminary requirements, not going to the question of power to contract;[2] and has held that the Circuit Courts of the United States were clothed with full authority, by *mandamus* or otherwise, to enforce the collection of judgments rendered therein on such bonds, and that this authority could not in the least be interfered with, either by the legislature or the judiciary of the states.[3] It has upheld and protected the rights of such creditors with a firm hand, disregarding, at times, it would seem, principles which it applied in other cases, and asserting the jurisdiction and authority of the federal courts with such striking energy and vigor as apparently, if not actually, to trench upon the lawful rights of the states and the acknowledged powers of the state tribunals; yet, upon the whole, there is little doubt that its course has had the approval of the profession in general and of the *public*, which neither appreciates nor cares for fine distinctions, and it will be well if it shall teach municipalities the lesson that if, having the power to do so, they issue negotiable securities, they cannot escape payment if these find their way into the hands of innocent purchasers. Unfortunately, the decisions on this important subject in the Supreme Court of the nation, and in some of the state courts, are not in all respects harmonious. Wherein the courts agree, and wherein they differ, will most satisfactorily appear by referring to some of the principal adjudications.[4]

[1] Gelpcke *v.* Dubuque, *supra;* Meyer *v.* Muscatine (charter authorizing *borrowing of money*), 1 Wall. 384; Rogers *v.* Burlington, 3 *ib.* 654; Van Hostrup *v.* Madison City, 1 Wall. 291; Seybert *v.* Pittsburg, 1 Wall. 272.

[2] Knox County *v.* Aspinwall, 21 How. 539; Moran *v.* Commissioners, 2 Black, 722; Bissell *v.* Jeffersonville, 24 How. 287; Marsh *v.* Fulton County, 10 Wall. 676, 1870.

[3] Von Hoffman *v.* Quincy, 4 Wall. 535; Galena *v.* Amy, 5 *ib.* 705; Riggs *v.* Johnson County, 6 *ib.* 166; Butz *v.* Muscatine, 8 *ib.* 575. See, also, *post*, Chap. XX. on Mandamus, and cases there cited.

[4] The general questions relating to the *power* to aid railways is considered in a previous chapter. *Ante*, Chap. VI. p. 144.

§ 417. *Leading Cases in the United States Supreme Court Noticed.* — The case of Knox County *v.* Aspinwall,[1] respecting the liability of municipal and public corporations on their negotiable railway aid bonds, deserves to be particularly noticed, as it is a leading case on this subject. The action was by a *bona fide* holder for value of certain coupons attached to bonds issued by Knox county, Indiana, in payment of a subscription to railroad stock. The defence was that the bonds were not binding upon the county, because the county commissioners possessed no power to execute them. By statute, the county commissioners were authorized "to take stock in the railroad, payable in county bonds, *provided a majority of the qualified voters* of said county, at any annual election, *shall vote for the same.*" The court were of the opinion, and so decided, that the county commissioners were the proper judges whether or not a majority of the votes in the county had been cast in favor of the subscription to the stock, and whether or not the election had been properly held, and that these questions cannot be determined collaterally in actions upon the bonds or coupons. The court, in assigning the reasons for this holding, speaking through Mr. Justice *Nelson*, say: "The right of the board [of county commissioners] to act in execution of the authority [conferred by the statute] is placed upon the fact that a majority of the votes had been cast in favor of the subscription; and to have acted without first ascertaining it, would have been a clear violation of duty; and the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose. The board was one, from its organization and general duties, fit and competent to be the depository of the trust thus confided to it. The persons composing it were elected by the county, and it was already invested with the highest functions concerning its general police and fiscal interests." "We do not say," he adds, "that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power, and before the rights and interests of third parties had attached; but after the authority has been executed, the stock subscribed, and the

[1] Knox County *v.* Aspinwall, 21 How. 539, 1858.

bonds issued and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question. Much less can it be called in question to the prejudice of a *bona fide* holder of the bonds in this collateral way."[1]

§ 418. The author ventures to remark that he believes the decision to be right, and for the reasons thus clearly stated by this able and experienced judge. But as sustaining the decision, a further position by way of agument is taken which, with great deference, he considers to be untenable, of a most dangerous nature and tendency, and plainly subversive of an important principle in the law of agency applicable both to private and public agents. That position is this: that a purchaser of the bonds had a right to assume, from the mere fact that they were issued, that the condition on which the county was authorized to issue them had been complied with, and that a recital in the bonds that the requirements of the law had been met amounts to *an estoppel in pais* upon the corporation, of which the officers issuing the bonds were the public agents. That this is the position assumed by the court, will appear by the following extract: "Another answer," continues Mr. Justice *Nelson* "to this ground of defence is, that the purchaser of the bonds had a right to assume that the vote of the county, which was made a condition to the grant of the power, had been obtained, from the fact of the subscription by the board to the stock of the railroad company, and the issuing of the bonds. The bonds, on their face, import a compliance with the law under which they were issued. 'This bond,' we quote, 'is issued in part payment of a subscription of $200,000, by the said Knox county, to the capital stock, &c. by order of the board of commissioners, in pursuance of the 3d section of the act, &c. passed by the General Assembly of the state of Indiana, and approved January 15th, 1849.' *The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power.*"[2] This principle has been reiter-

[1] Knox County *v.* Aspinwall, 21 How. 539, 544.

[2] *Ib.* 545.

ated and applied by the court in subsequent cases;[1] but in the full extent here stated, it is difficult to reconcile it with what was necessarily involved, as well as what was said in the more recent case of Marsh *v.* Fulton County.

§ 419. The *true view*, it is respectfully submitted, is this: Officers are the agents of the corporate body; and the ordinary rules and principles of the law of agency are applicable to their acts. Their unauthorized acts are not binding upon the corporate body of which they are the public agents. Ordinarily, their unauthorized representation that they have power to do an act is not binding upon the corporation; that is, the question is as to their power, *in fact and in law*, not what they have represented it to be. The only exception to this rule is where both parties have not equal means of knowledge as to the extent and scope of their powers, and where the particular character of their commission and authority is, from its nature and circumstances, peculiarly known to the officer or agent; in which case the principal will, or may, be bound by the false representations of the agent respecting his authority and its extent and scope; but where the authority to act is solely conferred by statute, which, in effect, is the letter of attorney of the officer, all persons must, at their peril, see that the act of the agent on which he relies is within the power under which the agent acts; and this salutary and sound doctrine seems to be recognized by the Supreme Court of the United States in

[1] Moran *v.* Miami County, 2 Black, 722, 724, 1862. Referring to Knox County, *v.* Aspinwall, the court observe that the main defence was, that the commissioners of the county had no power to execute the bonds, and hence they were not binding upon the county; but says the Supreme Court of the United States, *per Swayne*, J., in Moran *v.* Miami County, *supra*, "our answer and judgment was, that the bonds on their face import a compliance with the law under which they were issued; and that the purchasers of them were not bound to look further for evidence of a compliance with the conditions annexed to the grant of power to issue them." * * * "We think and adjudge that the recitals in the bonds are conclusive, constituting an estoppel *in pais* upon the defendants in this suit." (2 Black, 722, 724, 732.) *As to estoppel* in such cases: Rogers *v.* Burlington, 3 Wall. 654; Cincinnati *v.* Morgan, *ib.* 275; Mercer County *v.* Hacket, 1 *ib.* 83; Meyer *v.* Muscatine, *ib.* 385, 393, *per Swayne*, J.; Bissell *v.* Jeffersonville, 24 How. 287; Gelpcke *v.* Dubuque, 1 Wall. 175, 203; Flagg *v.* Palmyra, 33 Mo. 440.

its most recent judgments.[1] Accordingly, bonds issued in violation of an express statute or constitution are void, though in the hands of innocent holders, for value.[2]

§ 420. So in a subsequent case, similar in character, the common council of a city were, by virtue of various statutes, authorized to subscribe for stock in a railroad company, and to issue bonds in payment therefor *on the petition of three-fourths of the legal voters of the city.* Before the issue of the bonds, the council decided that three-fourths of the citizens had petitioned, and the bonds themselves thus recited. The Supreme Court of the United States held that the council was the tribunal to decide whether the requisite number had petitioned; that it was contemplated that this question, which was one of fact, should be ascertained and conclusively settled prior to the issue of the bonds; and that when sued upon the bonds by innocent holders for value, parol testimony was inadmissible to show that the petitioners did not constitute three-fourths of the legal voters of the city.[3]

[1] The Floyd Acceptances, 7 Wall. 666, 1868; Marsh *v.* Fulton County, 10 Wall. 676, 1870. See, also, Clark *v.* Des Moines, 19 Iowa, 199, 210, 1865; Treadwell *v.* Commissioners, 11 Ohio St. 183, 1860, reviewing and criticising Knox County *v.* Aspinwall, 21 How. 539. See, also, Gould *v.* Sterling (action on bonds), 23 N. Y. 464; S. C. 1 Am. Law Reg. (N. S.) 290, and note of Prof. *Dwight;* Starin *v.* Genoa, 23 N. Y. 452; People *v.* Mead, 36 N. Y. 224. United States *v.* City Bank of Columbus, 21 How. 356, 1858, is a very striking illustration of the general principle that a corporate officer cannot bind the corporation by his unauthorized acts or representations concerning the authority of himself or others: De Voss *v.* Richmond, 7 Am. Law Reg. (N. S.) 589; S. C. 18 Gratt. (Va.) 338, 1868.

[2] Aspinwall *v.* County of Daviess, 22 How. 1859; Marsh *v.* Fulton County, *supra.*

[3] Bissell *v.* Jeffersonville, 24 How. (U. S.) 287, 1860, approving Knox County *v.* Aspinwall, 21 How. 539; S. P. Railroad Company *v.* Evansville, 15 Ind. 395, 1860. This is clearly right, because, according to the rule before stated, the fact was one not of a nature to be ascertained by purchasers in the market to whom the bonds were designed to be sold. As to proceedings preliminary to issuing of bonds: *Ante,* p. 149; Commissioners *v.* Nichols, 14 Ohio St. 260; Achison *v.* Butcher, 3 Kansas, 304, 1865; Mercer County *v.* Hacket, 1 Wall. 83; Rogers *v.* Burlington, 3 *ib.* 654; Moran *v.* Miami Co. 2 Black, 722; Flagg *v.* Palmyra, 33 Mo. 440; Commonwealth *v.* Commissioners, &c. 37 Pa. St. 237; compare, Marsh *v.* Fulton County, 10 Wall. 676, 1870; Treadwell *v.* Commissioners, 11 Ohio St. 183, 1860. *Post,* Sec. 423.

§ 421. In another case,[1] the action was upon coupons payable to bearer belonging to negotiable bonds issued by a county in payment of stock subscribed in a railroad company. By an act of assembly, the county commissioners were authorized to subscribe the stock and issue the bonds only upon the following "restrictions, limitations, and conditions, and in no other manner or way whatever:" 1. "*After*, and not *before*, the *amount* of such subscription shall have been designated, advised, and recommended by a grand jury of the county." 2. Said "bonds shall, in no case, be *sold* by the railroad company *less than par*." 3. That the acceptance of this act shall be deemed the acceptance of another act fixing the gauges of railroads in the county of Erie. The plaintiff was a *bona fide* holder, for value of a number of the bonds issued by the county. To defeat a recovery, the county on the trial offered to show, not that *no* recommendation by a grand jury was ever made, but that no *such* recommendation was made as the act

A city was authorized to take stock in a railroad company "on the petition of two-thirds of the citizens, who are freeholders," &c. Bonds of the city were duly issued, signed by the proper officers and attested by the seal of the city, and on their face recited that they were issued by virtue of an ordinance of the city making the subscription. The minutes of the city council simply stated that "the freeholders of the city, *with great unanimity*, had petitioned," &c. It was held that the city council were the proper judges whether or not the required number had petitioned, and that the city, as against *bona fide* holders for value, was "concluded" by the ordinance "as to any irregularities that may have existed in carrying into execution the power granted to subscribe the stock and issue the bonds:" Van Hostrup *v.* Madison City, 1 Wall. (U. S.) 291, 1863; S. P. Meyer *v.* Muscatine (where charter required "a majority of two-thirds of the votes given") *ib.* 384, 393; Aurora *v.* West, 22 Ind. 88, 1864; *contra*, People *v.* Mead, 36 N. Y. 224.

Where the act authorizing a municipality to issue bonds was not to take effect until "approved by two-thirds of the electors present at a city meeting held for that purpose, and a *copy of its doings lodged in the office of the secretary of state;*" *bona fide* purchasers of such bonds are not bound to look beyond the certificate thus lodged, and are not affected by the action of the city, refusing at prior meetings to approve the act: Society for Savings *v.* New London, 29 Conn. 174, 1860.

Fraud in the election authorizing the subscription must be set up before rights have accrued: Butler *v.* Dunham, 27 Ill. 474; People *v.* Supervisors, 27 Cal. 655. Further as to the construction of *powers to aid in the building of railways*, see *ante*, Chap. VI. p. 144.

[1] Mercer County *v.* Hacket, 1 Wall. 83, 1863.

required. The following was the recommendation: The grand jury "would recommend (omitting the words 'designate and advise') the commissioners of Mercer county to subscribe an amount not exceeding $150,000,"—but not otherwise designating the amount. The bonds referred on their face to the act of assembly and its date which authorized their issue, and recited that they were issued in *pursuance* thereof. This was regarded by the court not as an offer to show "that no law exists to authorize their issue, but as one to show that the recitals in the bonds are not true, and to show that they were *not* made 'in pursuance of the acts of assembly' authorizing them;" and following Knox County *v.* Aspinwall,[1] it was adjudged that the matters thus offered to be shown constituted no defence against a *bona fide* holder, on the principle that "where bonds on their face import a compliance with the law under which they were issued, the purchaser is not bound to look further." And following Woods *v.* Laurence County,[2] it was also ruled that it was no defence against such a holder, that the bonds were sold by the railroad company less than par, they being negotiable and the plaintiff innocent. And it was also decided that the acceptance by the railroad company of the bonds authorized by the act, operated *per se* as an acceptance of the gauge law.

§ 422. In another case, authority to a city "to take stock in any chartered company for making a road, or roads, *to* the said city," was held in favor of a *bona fide* purchaser of its bonds, to authorize it to subscribe to a railroad which, by the terms of its charter, and in fact, did not terminate at said city, but whose nearest terminus was forty-six miles distant, it appearing that there was, at the time of said subscription, another railroad leading from that terminus to the city.[3]

[1] Knox County *v.* Aspinwall, 21 How. 539.

[2] Woods *v.* Laurence County, 1 Black. 386.

[3] Van Hostrup *v.* Madison City, 1 Wall. (U. S.) 291, 1863; see Aurora *v.* West, 9 Ind. 74; S. C. 22 *ib.* 88, 96, 503. The decision in Van Hostrup *v.* Madison City, *supra*, was doubtless influenced by a natural desire to protect the holders of the bonds. If the question had been one between the city and the railroad company, we doubt the correctness of the proposition that the Columbus and Shelby road, distant and between different points, was

§ 423. *State Court Decisions Referred to.*— The authority to subscribe to the stock of a railroad corporation may be *made conditional* on certain previous steps being taken, as, for example, a prior authorization of the act by a majority of the qualified voters of the municipality or district to be affected, or a recommendation in its favor and a designation of the amount by a grand jury, and the statute may be so framed as to evince the legislative intention to be, that *no power* to subscribe or issue bonds shall exist unless this be done.[1] Thus, where the act authorizing a town to borrow money to pay for the stock subscribed expressly provided that the officers thereof should "have *no power*" to do so until the written assent of

a road leading *to* Madison. In construing the language, "road, or roads," *to* said city, *Nelson*, J., says: "We think it quite clear, a subscription to a road *wholly unconnected* with roads leading to the city would not be within the fair meaning and intent of the charter, but are equally satisfied that a subscription to a road in *extension and prolongation* of one leading into the city is within it."

[1] Mercer County *v.* Pittsburg & Erie Railroad Company, 27 Pa. St. 389, 1856; Mercer County *v.* Hacket, 1 Wall. 83; Aurora *v.* West, 22 Ind. 88, 503, 1864. *Ante*, Chap. VI. p. 144. City and County of St. Louis *v.* Alexander, 23 Mo. 483, 1856. In this last case, the provision requiring a submission of the question to the voters "before the subscription hereby authorized shall be made," was held not merely directory, but mandatory. Where the enabling act requires the amount to be specified, a vote not specifying definitely the amount is void: State *v.* Saline County, 45 Mo. 242, 1870; following, Mercer County *v.* Pittsburg, &c. Railroad Company, 27 Pa. St. 389, and Starin *v.* Genoa, 27 N. Y. 439 (see *infra*), and distinguishing Knox County *v.* Aspinwall, 21 How. 539, and Flagg *v.* Palmyra, 33 Mo. 440; Trustees *v.* Cherry, 8 Ohio St. 564; and see Railroad Company *v.* Platte County, 42 Mo. 171, where permissive words respecting an election to authorize subscription were held to be imperative. In the Railroad Company *v.* Buchanan County, 39 Mo. 485, the words that the County Court, after an affirmative vote by the people, "shall have power to subscribe," were held to leave it discretionary with the court whether to subscribe or not. In the case of the People *ex rel. v.* Tazwell County, 22 Ill. 147, it was held, under the general law of the state, that it was discretionary whether the county should subscribe all or but a portion of the amount voted by the citizens, and that the county authorities might impose any proper conditions they might choose. So where the legislature, without conditions, provides for submitting the question of subscription to the voters of a township, the electors have the power to vote to subscribe on any conditions they may see proper to annex: People *v.* Dutcher, Ill. Sup. Court, May, 1871; see also People *v.* Logan County, 45 Ill. 139; Veeder *v.* Lima, 19 Wis. 280, 1865. *Post*, Chap. XX.

two-thirds of the resident tax payers had been obtained, this was held a condition precedent, without which the power did not exist.[1]

§ 424. So, under an act providing "that no subscription or purchase of stock shall be made, or bonds issued, by any county or city, creating a debt for the payment of such subscription, unless a *majority of the qualified voters* of the county or city shall vote for the same," it was held that bonds issued without an election, or where the election was called by the wrong authority (as by the county court instead of the county

[1] Starin *v.* Genoa, 23 N. Y. 439, 1861; Gould *v.* Sterling, *ib.* 439, 456; distinguished, on this point, from Bank of Rome *v.* Village of Rome, 19 N. Y. 20. Under the act it was held that the *onus* was on the plaintiff to show affirmatively the written assent of the requisite number of tax payers; and the manner in which this must be shown is considered at length. But see Bissell *v.* Jeffersonville, 24 How. 287; Knox County *v.* Aspinwall, 21 How. 539; Mercer County *v.* Hacket, 1 Wall. 83, heretofore referred to. In the People *v.* Mead, 36 N. Y. 224, 1867, the decision in Starin *v.* Genoa, and Gould *v.* Sterling, above cited, was adhered to by the Court of Appeals, though it was admitted that a contrary ruling as to the evidence of the assent of the tax payers, had been made by the Supreme Court of the United States in favor of similar bonds in the hands of *bona fide* holders, and the case was distinguished from Murdock *v.* Aiken, and Ross *v.* Curtis, 31 N. Y. 606. Illustrating text, see Benson *v.* Mayor, &c. of Albany, 24 Barb. 248. By its charter a city was authorized to take stock in railroads, "*provided*, that no stock shall be subscribed or taken by the common council, unless upon the petition of two-thirds of the residents of said city, who are freeholders of said city." It was held, in an action by the railroad company against the city on the contract of subscription, that it was the duty of the common council to determine whether the requisite number of the freeholders of the city had petitioned for the subscription, no other tribunal having been provided for that purpose; and having passed upon that question, their determination is conclusive, unless it may be set aside in some direct proceeding for that purpose: Railroad Company *v.* Evansville, 15 Ind. 395, 1860; following and applying, Knox County *v.* Aspinwall, 21 How. 539; see, also, Bissell *v.* Jeffersonville, 24 How. 287, 1860; Mercer County *v.* Hacket, 1 Wall. 83; compare, however, Veeder *v.* Lima, 19 Wis. 280, 1865; Duanesburg *v.* Jenkins, 40 Barb. 574; Society, &c. *v.* New London, 29 Conn. 174; State *v.* Saline County, 45 Mo. 242, 1870. Subscriptions to turnpike roads by the county judge, under acts of the legislature, were held unauthorized and void, it being admitted that an amount of stock sufficient, with the aid of county subscriptions, to complete each mile of road, had not been taken by *private subscription*, as required by the statutes: Clay *v.* County, 4 Bush (Ky.) 154.

board of supervisors), are void, *for want of power to issue them*, in whose hands soever they may be, and are not validated by the levy of taxes and the payment of interest thereon.[1]

§ 425. In a case in Ohio, where the legislature authorized "the county commissioners of any county *through or in which* a railroad might be located, to subscribe to the capital stock of the said company," and, for the purpose of paying therefor, "to borrow the necessary amount of money, for which they shall issue their negotiable bonds," &c., it was decided to be a defence to an action on the bonds (though by a *bona fide* holder), that the railroad was "never made or located through or in the county;" that it was "located and completed so as not to touch the county." The defence was held good, upon the obvious ground that the authority to issue the bonds never existed.[2]

[1] Marshall County *v.* Cook, 38 Ill. 44, 1865, commenting on and distinguishing, Mercer County *v.* Hackett, 1 Wall. 83, and Gelpcke *v.* Dubuque, *ib.* 175. See, also, Shoemaker *v.* Goshen, 14 Ohio St. 569; Berliner *v.* Waterloo, 14 Wis. 378; Veeder *v.* Lima, 19 Wis. 280, 1865; S. P. as to ratification, Marsh *v.* Fulton County, 10 Wall. 676, 1870. The corporation is estopped—where the power to issue existed—from setting up irregularities in the issue of the bonds, after repeated payments of interest thereon: Keithsburg *v.* Frick, 34 Ill. 405; Railroad Company *v.* Marion County, 36 Mo. 294; Mercer County *v.* Hubbard, 45 Ill. 139. The municipal authorities, on *mandamus* or other proceedings to compel them to make subscription to the railroad company, may show that the election was influenced by it and its employes, by bribery and corruption: People *v.* Supervisors, 27 Cal. 655, 1865; Butler *v.* Dunham, 27 Ill. 474. *Post*, Chap. XX.

Defective subscriptions may, of course, be *ratified by the legislature* in all cases where the legislature could originally have conferred the power: Keithsburg *v.* Frick, *supra;* Copes *v.* Charleston, 10 Rich. (So. Car.) Law, 491; McMillen *v.* Boyles, 6 Iowa, 304; *ib.* 394; Gelpcke *v.* Dubuque, 1 Wall. 220 (note statute there construed); People *v.* Mitchell, 35 N. Y. 551; Thompson *v.* Lee County, 3 Wall. 327; Bass *v.* Columbus, 30 Geo. 845, 1860; City *v.* Lamson, 9 Wall. 477, 1869. *Ante*, pp. 88–90.

[2] Treadwell *v.* Commissioners, 11 Ohio St. 183, 1860, reviewing and criticising, Aspinwall *v.* Commissioners of Knox County, 21 How. (U. S.) 539, approved in Bissell *v.* Jeffersonville, 24 How. (U. S.) 287, 1860. In Veeder *v.* Lima, 19 Wis. 280, 1865, Treadwell *v.* Commissioners and Gould *v.* Sterling, before cited, are approved, and Aspinwall *v.* Commissioners and Moran *v.* Miami County are criticised. Compare, State, &c. *v.* Van Horne, 7 Ohio St. 327; re-affirmed, State *v.* Trustees, &c. 8 Ohio St. 394, 401. The two cases last cited (7 Ohio St. 327, 8 *ib.* 394), do not intend, probably, to assert the

§ 426. It may be remarked, in conclusion, that this general survey of the adjudications shows some difference of judicial opinion (chiefly in cases involving the rights of innocent holders of negotiable municipal securities) respecting the evidence of the compliance with conditions precedent, and as to what will estop the municipality from showing a non-compliance in fact with such conditions. Yet, aside from these differences, the courts all agree that such a corporation may successfully defend against the bonds in whosesoever hands they may be, if its officers or agents, who assumed to issue them, had no *power* to do so.[1] The officers of such corporations possess no general power to bind them, and have no authority except such as the legislature confers. If the statute authorizes such a corporation to issue its bonds *only* when the measure is sanctioned by a majority of the voters, bonds issued without such a sanction (either in fact or according to the decision of some authorized body or tribunal), or when voted to one corporation and issued to another, are void, into whosesoever hands they may come.[2] This is the sound and true rule of law on this subject, and the one which has had the almost uniform approval of the state courts in this country, and has recently received the high sanction of the Supreme Court of the United

principle that the non-action of the tax-payers or inhabitants will supply a *want of power*, in the just sense of that expression, in the trustees to subscribe for the stock, or estop the *quasi* corporation from making the defence of *ultra vires*, if it existed.

[1] *Ante*, Chap. VI. p. 149, Sec. 108. The provisions of a railroad charter made it lawful for certain counties to subscribe stock on a majority vote, and, on such vote being had, made it the *duty* of the county commissioners to subscribe for stock and issue bonds therefor. Accordingly a vote was had, resulting in favor of the subscription; *after* the vote, but *before* the subscription was actually made and the bonds issued, counties were prohibited by law from subscribing for stock, unless paid for in cash: Held, that the power to subscribe and the vote did not constitute a contract within the meaning of the clause of the constitution making contracts inviolable; that until the subscription was actually made the contract was unexecuted, and that bonds thus issued were void, even in the hands of innocent holders for value: Aspinwall *v.* County of Jo Daviess, 22 How. (U. S.) 364, 1859. *Ante*, p. 88, Sec. 42.

[2] *Ante*, Chap. VI. p. 149.

States.[1] The distinction, however, must be observed between want of power to issue the bonds and irregularities in the exercise of the power, which are unavailing against the *bona fide* holder, without notice of the irregularity.

[1] Marsh *v.* Fulton County, 10 Wall. 676, 1870. Speaking of this subject, Mr. Justice *Field*, in the case just cited, delivering the opinion of the Court, says: "But it is earnestly contended that the plaintiff was an innocent purchaser of the bonds, without notice of their invalidity. If such were the fact, we do not perceive how it could affect the liability of the county of Fulton. This is not a case where the party executing the instruments possessed a general capacity to contract, and where the instruments might, for such reason, be taken without special inquiry into their validity. It is a case where the power to contract never existed—where the instruments might, with equal authority, have been issued by any other citizen of the county. It is a case, too, where the holder was bound to look to the action of the officers of the county and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as innocent purchaser can be claimed by the holder. This is the law even as respects commercial paper, alleged to have been issued under a delegated authority, and is stated in the case of Floyd Acceptances (7 Wall. 666). In speaking of notes and bills issued or accepted by an agent, acting under a general or special power, the court says: 'In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued.'" And in this case the bonds of the county of Fulton, though negotiable in form, and not disclosing or reciting their purpose or origin, were held void, in the hands of *bona fide* holders, for want of authority in the county to issue them—having been voted to one corporation and delivered to (according to the view of the court) another and distinct corporation. See Society, &c. *v.* New London, 29 Conn. 174; compare, People *v.* Mead, 36 N. Y. 224; Adams *v.* Railroad Company, 2 Coldw. (Tenn.) 645.

Defences grounded on corporate neglect, or technical in their nature, are not favored when the bonds are in innocent hands: Maddox *v.* Graham, 2 Met. (Ky.) 56; Commonwealth *v.* Pittsburgh, 43 Pa. St. 391. The issue of the bonds proves that conditions precedent, imposed by *ordinance*, have been complied with or waived: Commonwealth *v.* Pittsburgh, *supra;* Gilchrist *v.* Little Rock, 1 Dillon, C. C. 261.

The Supreme Court of the United States has very recently held, in an action on negotiable bonds issued by a public corporation, that where the defendant has shown *fraud in the origin or inception* of the instruments, this will throw upon the holder the burden of showing that he gave value for them before maturity: Smith *v.* Sac County, 11 Wall. 139, 1870, *Clifford, J.*, dissenting.

CHAPTER XV.

Corporate Property.

§ 427. We have next to consider the powers of municipal corporations relating to property.[1] The *history* of the capacity of such corporations to acquire and hold property is so clearly given by Mr. Justice *Campbell*, in his learned judgment, in the great McDonough Will Case,[2] in the Supreme Court of the United States, that it fittingly serves as an introduction to the more special discussion and treatment of the subject. *Civil Law:* "The Roman jurisprudence," he observes, "seems originally to have denied to cities a capacity to inherit, or even to take by donation or legacy. They were treated as composed of uncertain persons, who could not perform the acts of volition and personalty involved in the acceptance of a succession. The disability was removed by the Emperor Adrian in regard to donations and legacies, and soon legacies *ad ornatum civitatis* and *ad honorem civitatis* became frequent. Legacies for the relief of the poor, aged, and helpless, and for the education of children, were ranked of the latter class. This capacity was enlarged by the Christian Emperors, and after the time of Justinian there was no impediment. Donations for charitable uses were then favored; and this favorable legislation was diffused over Europe by the canon law, so that it became the common law of Christendom."

§ 428. *Subsequent Modification in Europe.*—"When the power of the clergy began to arouse the jealousy of the temporal authority, and it became a policy to check their influence and wealth—they being, for the most part, the managers of the

[1] Extent of *legislative authority* over the *property* of municipal and public corporations: *Ante*, Chap. IV.

[2] McDonough Will Case, 15 How. 367, 403, 1853. The nature of Mr. McDonough's will, in favor of the cities of New Orleans and Baltimore, will be found stated further on in this chapter.

property thus appropriated — limitations upon the capacity of donors to make such gifts were first imposed. These commenced in England in the time of Henry III.; but the learned authors of the history of the corporations of that realm affirm, that cities were not included in them — 'perhaps upon the ground that the grants were for the public good;' and, although 'the same effect was produced by the grant in perpetuity to the inhabitants,' 'the same practical inconvenience did not arise from it, nor was it at the time considered a mortmain.'[1] 'A century later there was a direct inhibition upon grants to cities, boroughs, and others, which have perpetual commonalty,' and others 'which have offices perpetual,' and, therefore, 'be as perpetual as people of religion.' The English statutes of mortmain forfeit to the king or superior lord the estates granted, which right is to be exerted by entry; a license, therefore, from the king severs the forfeiture. The legal history of the continent on this subject does not materially vary from that of England. The same alternations of favor, encouragement, jealousy, restraint, and prohibition, are discernible. The Code Napoleon, maintaining the spirit of the ordinances of the monarchy, in 1731, 1749, 1762, provides 'that donations, during life or by will, for the benefit of hospitals of the poor of a commune, or of establishments of public utility, shall not take effect, except so far as they shall be authorized by an ordinance of the government.' The learned Savigny, writing for Germany, says: 'Modern legislation, for reasons of policy or political economy, have restrained conveyances in mortmain, but those restrictions formed no part of the common law.' The laws of Spain contained no material change of the Roman and ecclesiastical laws upon this subject."

§ 429. *These Restrictions not in Force in this Country.*—"This legislation of Europe was directed to check the wealth and influence of juridical persons who had existed for centuries there, some of whom had outlived the necessities which had led to their organization and endowment. Political reasons entered largely into the motives for this legislation — reasons which

[1] Mereweth. & Steph. Hist. Corp. 489, 702.

never extended their influence to this continent, and, consequently, it has not been introduced into our systems of jurisprudence." [1]

§ 430. *Result of Legislation in Europe.*—"The precise result of the legislation is, that corporations there (in England and Europe), with the capacity of acquiring property, must derive their capacity from the sovereign authority, and the practice is, to limit that general capacity within narrow limits, or to subject each acquisition to the revisal of the sovereign." [2]

§ 431. It is a settled rule of the common law that a *grant*, to be valid, must be *to a corporation, or to some certain person* named, who can take, by force of the grant, and hold either in his own right or as trustee.[3] Therefore, a grant by an individual, of a lot of land to "the people of" a specified county, not incorporated, is void.[4] So a *reservation* in a deed, in favor of the inhabitants of an unincorporated place, is invalid.[5] But

[1] 2 Kent Com. 282, 283; Whicker *v.* Hume, 14 Beav. 509; see, also, Chambers *v.* St. Louis, 29 Mo. 543, 575, and remarks of *Scott*, J.

[2] Per Mr. Justice *Campbell*, 15 How. 404–407.

[3] Co. Litt. 3, *a;* 10 Co. 26, *b;* Com. Dig. Tit. *Capacity*, B. 1; Shep. Touch. 236. "It is a general rule, that corporations must take and grant by their corporate name:" 2 Kent. Com. 291. A corporation aggregate can have no predecessor, and in a writ of right can only count on its own seizin. A statute of 1772, in Massachusetts, provided that twelve persons should be chosen annually by the inhabitants of the town of Boston as overseers of the poor, and they were duly incorporated. In 1822 the town of Boston was changed to a city, the act providing for the election of a board of overseers for the city who shall have all the powers and be subject to all the duties now, by law, pertaining to the overseers of the poor for the town of Boston. It was decided, upon great consideration—*Shaw*, C. J., delivering the opinion—that this was a *continuance*, and not a *dissolution* or *suspension*, of the corporation of 1772; that the bodies were public corporations, aggregate and not sole, with perpetual succession; that a grant to them of real estate carried the fee, without being, to their successors, and that in a writ of right they can count only upon their own seizin within thirty years next before the commencement of the action: Overseers of the Poor, &c. *v.* Sears, 22 Pick. 122, 1839.

[4] Jackson *v.* Cory, 8 Johns. 385, 1811; Jackson *v.* Hartwell, *ib.* 422.

[5] Hornbeck *v.* Westbrook, 9 Johns. 73, 1812. See reference to this case and Jackson *v.* Cory, 8 Johns. 385, by *Savage*, C. J., in North Hempstead *v.* Hempstead, 2 Wend. 109, 133. Although a deed may not operate as a *grant*

a grant by the state or by the *sovereign authority* having the right to create corporations, to one or more persons who are *named* as patentees for themselves and the inhabitants of a designated town is valid, because the grant itself, coming from this source, confers a capacity to take and hold the lands in a corporate character.[1]

§ 432. The English statutes of *mortmain* are not in force in this country, unless by virtue of express legislation to that effect;[2] and consquently, a municipal corporation has the common law or implied power, unless restrained by charter or statute, to purchase and hold all such real estate as may be necessary to the proper exercise of any power specifically granted, or essential to those purposes of municipal government for which it was created.[3] This power may be, and indeed, often is, conferred in express terms. But it may result,

because of a want of legal capacity in the grantee to take, yet if it contains a general covenant of warranty it may operate by way of *estoppel:* Terrett *v.* Taylor, 9 Cranch (U. S.), 43, 52, 53; Mason *v.* Muncaster, 9 Wheat. 445. As to grants and devises for charitable purposes, see *infra.*

[1] North Hempstead *v.* Hempstead, 2 Wend. 109, 133, 1828; and see, also, Denton *v.* Jackson, 2 Johns. Ch. 320; 7 *ib.* 254; Goodrell *v.* Jackson, 20 Johns. 706; Jackson *v.* Leroy, 5 Cow. 397; Bow *v.* Allentown, 34 N. H. 351, 372. The right of a municipal corporation to its grants of property is not destroyed by a change of its name, and an enlargement of its territory, and a reconstruction of its powers: Girard *v.* Philadelphia, 7 Wall. 1. *Ante,* Chap. IV.; Chap. V. p. 99; Chap. VII. p. 159, Sec. 115.

[2] Perin *v.* Carey (charitable devise to Cincinnati), 24 How. 465, 1860; Davison College, *v.* Chambers Executors, 3 Jones Eq. (N. C.), 253, 1857; 2 Kent Com. 282, 283; Chambers *v.* St. Louis, 29 Mo. 543, 575, *per Scott,* J.; 2 Wasb. Real Property (2d edition), 591, top; Paige *v.* Heinburg, 40 Vt. 81.

[3] Ketchum *v.* Buffalo, 14 N. Y. 356, 360, 1856, *per Selden,* J.; 2 Kent Com. 281; Co. Litt. 44 *a,* 300 *b;* 1 Kyd on Corp. 76, 78, 108, 115; State *v.* Commissioners, &c. 3 Zabr. (N. J.) 510; Nicoll *v.* Railroad Company, 12 N. Y. (2 Kern.) 121, 127; McCartee *v.* Orphans' Society, 9 Cow. 437; *Ex parte* Iron Company, 7 Cow. 240, 552; Heirs of Reynolds *v.* Commissioners, &c. 5 Ohio, 204, 1831; Perin *v* Carey, *supra;* State *v.* Brown, 3 Dutch. (N. J.) 13; Davison College *v.* Chambers Executors (full discussion), 3 Jones Eq. (N. C.) 253; Paige *v.* Heinburg, 40 Vt. 81; State *v.* Madison, 7 Wis. 688; Louisville *v.* Commonwealth, 1 Duvall (Ky.), 295. Implied or express restrictions on the right to take and hold real estate are not, in this country, construed in a spirit of hostility and jealousy: *Per Scott,* J., in Chambers *v.* St. Louis, 29 Mo. 543, 573, 576,

in the absence of express provision, as a necessary incident to powers specifically granted. To illustrate the last proposition: Power is given to a city to "establish markets," that is, public places for the sale of commodities. To establish such place, ground is necessary. A market house on the public streets, or on the public square, would be a nuisance. It could not be erected or established upon private property without consent or grant. Thus, by this course of reasoning, the result is reached that the power "to establish a market," of necessity, implies or carries with it the power to lease or purchase the requisite site. Such an authority could not probably be deduced from the words "*to regulate* markets," because the words "to regulate" "naturally, if not necessarily, pre-suppose the existence of the thing to be regulated."[1]

§ 433. The *charter is the source of power* in respect to the property rights of the corporation. If the charter be silent the implied power exists, at least to the extent just stated, to acquire, hold, and alienate or dispose of property. But it is not unusual for the charter to grant the power and fix its limits. Where this is done, the terms and purpose of the grant determine the nature, extent, and limitations of the power, the charter being construed, of course, in the light of the general legislation of the state. And general authority to purchase and hold property should, doubtless, be construed to mean for purposes authorized by the charter, and not for speculation or profit.[2]

[1] Ketchum *v.* Buffalo, 14 N. Y. 356, 1856. See, also, Peterson *v.* Mayor &c. of New York, 17 N. Y. 449, reversing S. C. 4 E. D. Smith, 413, 1858; Le Couteleux *v.* Buffalo, 33 N. Y. 333, 1865.

[2] Bank of Michigan *v.* Niles, 1 Doug. (Mich.) 401; Davison College *v.* Chambers' Executors, 3 Jones, Eq. (N. C.) 253, 1857; State Bank *v.* Brackenridge, 7 Blackf. (Ind.) 395, 1845. *Ante*, chapters V., VI., XII., XIV. A special provision in a charter authorizing the corporation to take and hold real estate by purchase, is to be construed as meaning that it may do this, subject to the restrictions created by the general statutes of the state relating to this matter: McCartee *v.* Orphan Asylum Society, 9 Cow. 437, 1827. Charter and general law construed together, being *in pari materia:* Chambers *v.* St. Louis (Mullanphy Will Case), 29 Mo. 543, 1860. A city, owning the soil, may, like other owners, reclaim the *land between high and low water mark*, and when thus reclaimed a highway may be laid out upon it: Rich-

§ 434. "The inference," says Chancellor *Kent*, "from the statutes creating corporations and authorizing them *to hold* real estate to a certain *limited extent* is, that our statute corporations cannot take and hold real estate for purposes foreign to their institution."[1] In an important case in Louisiana it was decided that a purchase of real estate by the corporation

ardson *v.* Boston, 24 How. (U. S.) 188, and cases cited. *Ante*, p. 120, Sec. 73. Rights to *alluvion* within corporate limits: Kennedy *v.* Municipality, 10 La. An. 54; Barett *v.* New Orleans, 13 *ib.* 105; *ib.* 154; *ib.* 349; Remy *v.* Municipality 11 *ib.* 148; Carrollton Railroad Company *v.* Winthrop, 5 *ib.* 36; Beaufort *v.* Duncan, 1 Jones, Law, 234; Richardson *v.* Boston, 24 How. (U. S.) 188, and cases cited. Rights as *riparian proprietor to wharf out: Ante*, p. 119; Dana *v.* Wharf Company, 31 Cal. 118; People *v.* Broadway Wharf Company, *ib.* 33; San Francisco *v.* Calderwood, *ib.* 585; Bell *v.* Gough, 3 Zabr. 624. *Ante*, Secs. 70–75.

A municipality owning land is *not estopped* to claim title to it, because its officers, without authority, have assessed the same to a private person, returned the same as delinquent, and subsequently sold it at a tax sale. The reason is, that all these acts of its officers are unauthorized and void, and a purchaser at a tax sale is bound to take notice of the extent of their powers: St. Louis *v.* Gorman, 29 Mo. 593, 1860. Same principle: Rossire *v.* Boston, 4 Allen, 57; McFarland *v.* Kerr, 10, Bosw. (N. Y) 249.

As to *adverse possession* against public corporation: *Ib.*; Turney *v.* Chamberlain, 15 Ill. 271; Alton *v.* Illinois Transfer Company, 12 Ill. 60.

Special powers construed: State *v.* University, 4 Humph. 157; State *v.* Madison, 7 Wis. 688; Beaver Dam *v.* Frings, 17 Wis. 398; Galloway *v.* London, Law Rep. 1 H. L. 34; Heyward *v.* Mayor, &c. of New York, 7 N. Y. 314. A deed of land to a town and its assigns, for value, expressed in the usual terms of a conveyance, and containing covenants, was construed to grant a fee simple, although the land was expressed to be for the use of a common, or "a meeting-house green:" Beach *v.* Haynes, 12 Vt. 15, 1840; State *v.* Woodward, 23 *ib.* 92, 1850. When conveyance to a corporation passes *a full title*, and not one in trust or conditional: Kerlin *v* Campbell, 3 Harris (Pa.),500; Wright *v.* Linn, 9 Barr, 433; Holliday *v.* Frisbie, 15 Cal. 630. When a tract of land is granted for a *specific purpose*, as for a school house, and a school house is erected and a school maintained therein, the grant is not forfeited by the use of a portion of the land not needed for the school, for other purposes, such as leasing it for cultivation, or for building an engine house thereon, or the like: Castleton *v.* Langdon, 19 Vt. 210, 1847; *vide* Index—Dedication. Under the power to purchase and hold property, a *city* and *county* may *own buildings as tenants in common*, to be used for their respective public purposes: De Witt *v.* San Francisco, 2 Cal. 289, 1852. See Bergen *v.* Clarkson, 1 Halst. (N. J.) 352. *Ante*, p. 135 Sec. 92. Rights of *county and city* respecting *jail* built by the corporate authorities of the city: Felts *v.* The Mayor, &c. 2 Head (Tenn.), 363.

[1] Kent Com. 283.

of the defendant, for $247,000, payable in bonds, at twenty-five years from date, for the purpose of platting and re-selling the same, and thereby improve the salubrity of the city, and promote the convenience of the citizens as to streets, was legal.[1] If the court was right in holding that the charter and laws authorized the purchase of real estate without restriction,—which admits of doubt,—the case shows the wisdom of the usual limitations in charters disabling such corporations from acquiring, by purchase, real estate for other than corporate purposes.

§ 435. Municipal corporations being created chiefly for governmental purposes, and for the attainment of local objects merely, the general rule is, that they cannot purchase and hold real estate *beyond their territorial limits*, unless this power is conferred by the legislature.[2] It has been expressly decided that a conveyance to a municipal corporation of lands beyond its boundaries, for the purpose of a *street*, is void, though the corporation has, by its charter, power "to purchase, hold, and convey any real property for the public use of the corporation."[3] The author is inclined to think that there are purpurposes for which such a corporation may, without special grant, purchase and hold lands extra-territorially, as for a pest house, cemetery, and the like objects of a municipal character.[4]

[1] Municipality *v.* McDonough, 2 Rob. (La.) 244, 1842.

[2] Denton *v.* Jackson, 2 Johns. Ch. 336; North Hempstead *v.* Hempstead, 2 Wend. 131; Hopk. 594; Riley *v.* Rochester, 9 N. Y. (5 Seld.) 64, 1853, reversing S. C. 13 Barb. 321; Girard *v.* New Orleans, 2 La. An. 897; Chambers *v.* St. Louis, 29 Mo. 543, 1850; Bullock *v.* Curry, 2 Met. (Ky.) 171 Concord *v.* Boscawen 17 N. H. 465.

[3] Riley *v.* Rochester, *supra.*

[4] See observations of *Scott*, J., Chambers *v.* St. Louis, 29 Mo. 542, 574, 575, as to object of express authority to hold lands beyond corporate limits for such purposes. Municipal corporations may, for proper or authorized purposes, *hold lands in other states*, unless restrained by the laws of the latter state. The right depends upon comity, or the consent, expressed or implied, of the sister state: McDonough Will Case, 15 How. (U. S.) 567, 1863; Angell & Ames, Corp. Chap. V. Sec. 161; 1 Wasb. Real Property, 50, pl. 27; Chambers *v.* St. Louis, *supra;* Seebold *v.* Shitler, 34 Pa. St. 133; Bank of Augusta *v.* Earle, 13 Pet. 519, 584, 1839; Runyan *v.* Coster's Lessee, 14 *ib.* 122. In these last two cases the extra-territorial rights of corporations are very elaborately discussed and examined.

§ 436. Municipal and public corporations *may be the objects of public and private bounty.* This is reasonable and just. They are in law clothed with the power of individuality. They are placed by law under various obligations and duties. Legacies of personal property, devises of real property, and gifts of either species of property, directly to the corporation and for its own use and benefit, intended to and which have the effect to ease them of their obligations or lighten the burdens of their citizens, are valid in law, in the absence of disabling or restraining statutes.[1] Thus, a conveyance of land to a town or other public corporation *for benevolent or public purposes*, as for a site for a school house, city or town house, and the like, is based upon a sufficient consideration, and such conveyances are liberally construed in support of the object contemplated.[2]

[1] Inhabitants, &c. of Sutton *v.* Cole, 3 Pick. 232, 238, 1825, *per Parker*, C. J.; Inhabitants, &c. of Worcester *v.* Eaton, 13 Mass. 371, 378, 1816; Hamden *v.* Rice, 24 Conn. 350, 1856; Cogshall *v.* Pelton, 7 Johns. Ch. 292 (bequest to erect town house); McDonough Will Case, 15 How. 367, 1855; 2 Kent Com. 285; Angell & Ames, Secs. 177, 178.

Speaking of Missouri, *Scott*, J., says: "There is nothing in our statute concerning wills which prohibits corporations from taking by devise; so that, as to their capacity to take by devise, they stand on the same ground as natural persons:" Chambers *v.* St. Louis, 29 Mo. 543, 574. So in Ohio: Perin *v.* Carey, 24 How. 465, 505, *per Wayne*, J. In New York, by the statute of wills, following the English statutes of Henry VIII., "bodies politic and corporate" are incapacitated to take real estate, and a devise *directly* to a corporation, and not to a natural person in trust for the corporation, was adjudged to be void by the statute; and this notwithstanding the corporate devisee was, by its charter, declared to be "capable in law of purchasing, holding, and conveying real estate for the use of the said corporation." This special authority to take by "*purchase*" (which term was held not to include a *devise*) was, by the majority of the Court of Errors, considered to mean subject to the restrictions and incapacities created by the general statutes: McCartee *v.* Orphan Asylum Society, 9 Cow. 437, 1828. As to devises in New York in trust for a corporation, under statute, see Theological Seminary *v.* Childs, 4 Paige, 418; Wright *v.* M. E. Church, 1 Hoff. Ch. 225. But authority to a corporation to take land "by direct purchase or otherwise," gives capacity to take by devise: Downing *v.* Marshall, 23 N. Y. 366, 1861. Authority "to hold, purchase, and convey," confers capacity to receive a devise of lands: American Bible Society *v.* Marshall, 15 Ohio St. 537.

[2] Castleton *v.* Langdon (land conveyed to town for school house), 19 Vt. 210, 1847; Jackson *v.* Pike (land conveyed to county for court house and jail), 9 Cow. 61, 1828; State *v.* Atkinson ("public common"), 24 Vt. 448; Le Couteleux *v.* Buffalo (conveyance for "free school"), 33 N. Y. 333, 1865;

§ 437. Not only may municipal corporations take and hold property in their own right by direct gift, conveyance, or devise, but the cases firmly establish the principle, also, that such corporations, at least in this country, are capable, unless specially restrained, of *taking property*, real and personal, *in trust* for purposes germane to the objects of the corporation, or which will promote, aid, or assist in carrying out or perfecting those objects. So such corporations may become *cestuis que trust* within the scope of the purposes for which they are created. And where the trust reposed in the corporation is for the benefit of the corporation, or for a charity within the scope of its duties, it may be compelled, in equity, to administer and execute it.[1]

French *v.* Quincy (conveyance for "town house"), 3 Allen, 9. Corporations may, for such purposes, purchase and take the *fee* of lands, and change the location at will. This is unlike the ordinary case of the dedication by an individual of the *use* of lands to some public purpose—*e. g.* a town common—in which case the corporation cannot alien the land: Beach *v.* Haynes, 12 Vt. 15, 1840; State *v.* Woodward, 23 *ib.* 92, 1850. That municipal corporations may be authorized to take, hold, and alienate lands *in fee*, see, also, 2 Kent Com. 281; Heyward *v.* Mayor, &c. of New York, 7 N. Y. 314, 1852; The People *v.* Mauran, 5 Denio, 389, 1848; Heirs of Reynolds *v.* Commissioners, &c. 5 Ohio, 204, 1848; Nicoll *v.* Railroad Company, 12 N. Y. 121, 1854; Page *v.* Heinburg, 40 Vt. 81.

[1] 2 Kent Com. 279, 280; Jackson *v.* Hartwell, 8 Johns. 422; 1 Kyd, 72; Green *v.* Rutherford, 1 Ves. 462; Trustees, &c. *v.* King, 12 Mass. 546; Pickering *v.* Shotwell, 10 Barr (Pa.), 27; Chambers *v.* St. Lauis, 29 Mo. 543, 1860; Mayor, &c. *v.* Elliot, 3 Rawle (Pa.), 170; McDonough Will Case, 15 How. 367, 1853; McDonough's Case (in Supreme Court of Louisiana), 8 La. An. 171, 1853; Girard's Will, 2 La. An. 898; 2 How. 127, 1844; 7 Wall. 1; 2 Wash. Real Prop. 205, pl. 3; Angell & Ames, Corp. Sec. 168; Willis Trust. 33–45; Perin *v.* Carey, 24 How. 465, 1860; Bell County *v.* Alexander, 22 Texas, 350, 1858; Columbia Bridge *v.* Kline, Bright. (Pa.) 320; Miller *v.* Lerch, 1 Wall. Jr. (Pa.) 210; Webb *v.* Neal, 5 Allen, 575, 1863.

It is quite usual in England for municipal corporations to hold property for *charitable trusts* of a public nature, over the administration of which chancery has jurisdiction, and the subject of such trusts is regulated by the Municipal Corporations Act of 5 and 6 Will. IV. Chap. LXXVI. Sec. 71. See Rex *v.* Saukey, 5 A. & E. 423; Grant, Corp. 136. Tolls granted by charter to a corporation, for the reparation of walls and bridges within the borough, are gifts for charitable purposes, within 39 Eliz. Chap. V., to be administered in chancery: Attorney General *v.* Shrewsbury, 6 Beav. 220; *In re* Corporation of Newcastle, 12 Cl. & F. 402; *ib.* 487; Mayor, &c. *v.* Attorney General, 3 Cl. & F. 289. *Post*, Chap. XXII.

§ 438. The leading case in this country on the subject mentioned in the last section is the celebrated *Girard Will Case*, reported in the Supreme Court of the United States, under the name of Vidal *v.* Girard's Executors.[1] Better to understand the case, it may be stated that the act incorporating the city of Philadelphia expressly provided that the corporation should have power "to purchase, take, possess, and enjoy lands, franchises, goods, chattels," &c., without limitation as to value or amount; and 32 and 34 Henry VIII. disabling corporations from taking by devise, was declared not to be in force in Pennsylvania. Under these circumstances, it was held that the corporation of the city had the capacity to take real and personal property by *devise*, as well as by deed. The city also possessed general power "for the suppression of vice and immorality, the advancement of the public health and order, and the promotion of trade, industry, and happiness." Girard's devise was *to the city, in trust*, for the establishment of a *college for the education and support of indigent orphan boys*. This presented the inquiry whether the corporation was capable of taking real and personal estate in trust, and of executing the trust, and the affirmative of both propositions was adjudged.

[1] Vidal *v.* Girard's Executors, 2 How. 127, 1844. The court lays down this rule: "Where the corporation has a legal capacity to take real or personal estate, there it may take and hold it upon trust, in the same manner and to the same extent as a private person may do. It is true that if the trust be repugnant to, or inconsistent with, the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it. But it will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust." (Re-affirmed, Perin *v.* Carey, 24 How. 465, 1860; Girard *v.* Philadelphia, 7 Wall. 1, 1868.) The following further observations of Mr. Justice *Story* (who delivered the opinion of the court in the Girard Will Case) are of especial value: "If the purposes of the trust be germane to the objects of the incorporation; if they relate to matters which will promote, and aid, and perfect those objects; if they tend (as the charter of the city of Philadelphia expresses it) 'to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness,' where is the law to be found which prohibits the corporation from taking the devise upon such trust, in a state where the statutes of mortmain do not exist (as they do not in Pennsylvania), the corporation itself having a legal capacity to take the estate as well by devise as otherwise? We know

§ 439. The *McDonough Will Case* affords an interesting and instructive illustration of the foregoing principles. John McDonough died in New Orleans, and, by will, gave a large amount of real and personal property to the city of New Orleans (his adopted residence) and to the city of Baltimore (his native place), and their successors forever, with a prohibition against any alienation or division of the real estate, under penalty of forfeiture. This devise was made for the purpose of "*educating the poor*, without the cost of a cent to them, *in the cities of New Orleans and Baltimore*, and their respective suburbs." The estate thus devised was to be managed by six agents, three to be selected annually by each city, and the municipal authorities were, by the will, excluded from the management of the estate or the application of its revenues. By the civil code of Louisiana, corporations created by law are permitted to possess an estate, *receive donations and legacies*, make valid contracts and manage their own business; and the city of New Orleans was, by statute, authorized and required to establish *public schools* for gratuitous education, &c. The city of Baltimore was authorized, by statute, to establish *public schools*, and to receive property in trust, and to control and exercise the trust for any of its general corporate purposes, including educational and charitable purposes of any description, within its limits. This will was contested by the heirs. It was held by the Supreme Court of the United States that these cities, under the powers conferred upon them, had the right to

of no authorities which inculcate such a doctrine or prohibit the execution of such trusts, even though the act of incorporation may have for its main objects mere civil and municipal government, and regulation, and powers. If, for example, the testator by his present will had devised certain estate of the value of $1,000,000 for the purpose of applying the income thereof to supplying the city of Philadelphia with good and wholesome water for the use of its citizens, from the river Schuylkill, why, although not specifically enumerated among the objects of the charter, would not such a devise upon such a trust have been valid, and within the scope of the legitimate purposes of the corporation, and the corporation capable of executing it as trustees?" The learned judge further observes: "Neither is there any positive objection, in point of law, to a corporation taking property upon a trust not strictly within the scope of the direct purposes of the institution, but collateral to them." See, also, 24 How. 465, *supra*. By this it is not meant that a corporation may take and *execute* trusts for objects "utterly *dehors* the purposes of the incorporation."

receive this devise, and that the will was valid. It was also held that, under the Louisiana code (C. C. 2026), the prohibition against alienation did not invalidate the will. And the court expressed the opinion that, by the common law, the restraints upon alienation and partition were not conditions precedent, but conditions subsequent; and would not, therefore, by the common law rule, even if illegal, divest the estate or invalidate the will.[1]

§ 440. The subject again underwent a full examination in the *McMicken Will Case*, reported under the name of Perin *v.* Carey.[2] Charles McMicken devised and bequeathed a large amount of real and personal property "to the city of Cincinnati and its successors, in trust, for the purpose of building, establishing, and maintaining, two colleges for the *education* of boys and girls, and if there shall remain a sufficient surplus of funds, the same to be applied to the *support* of poor white male and female orphans." By the will, the city is directed to make and establish all necessary regulations, and to appoint directors to the institution; and it *is prohibited from ever selling* any portion of the real estate devised, or any which the city should purchase for the benefit of said institution. By its charter, the city had express power given it to acquire and hold real estate for the legitimate objects of the city. There was nothing in

[1] McDonough Will Case, 15 How. (U. S.) 367, 1853. The same will was previously adjudged to be valid by the Supreme Court of Louisiana. Mr. Chief Justice *Eustis*, in delivering the opinion of the state court, sustaining McDonough's will, says: "That, without a positive prohibition, municipal corporations in Louisiana should be incapacitated from receiving legacies for the public purposes of health, education, and charity, seems to me repugnant to all sound ideas of policy, and to the reason of the law:" 8 La. An. 171, 1853. The Girard legacy was sustained by the same court: Girard Heirs *v.* New Orleans, 2 La. An. 898.

[2] Perin *v.* Carey, 24 How. 465, 1860. In Maryland (where, however, the statute of 43 Elizabeth is not in force), a devise to the city of Baltimore, "to be applied, under the direction of said corporation, to the relief and support of the indigent and necessitous poor persons who may, from time to time, reside within the limits, as now known, of the twelfth ward of said city," was adjudged void, as being "too vague and indefinite, and too difficult of being correctly ascertained, to be enforced." The case was regarded as being embraced in the prior decisions: Trippe *v.* Frazier, 4 Har. & Johns. 446; Dashiell *v.* Attorney General, 5 *ib.* 392; 6 *ib.* 1.

the charter or statutes of the state prohibiting the city from taking and administering charitable trusts. The court decided that the will was valid; that the city, as a corporation, was capable of taking and administering the devises and bequests for the charitable uses specified; and that the restraint upon alienation created no perpetuity in the sense forbidden by the law.

§ 441. By the *will of Mr. Bryan Mullanphy* (founding a charity now in beneficent operation), he devised "one-third of all his property, real and personal, to the *city of St. Louis, in trust*, to be and constitute a fund *to furnish relief to all poor emigrants and travelers coming to St. Louis* on their way, *bona fide*, to settle in the west." The greater part of his estate, valued at over $1,500,000, consisted of lands in St. Louis county, but outside of the city limits. It was held, under special provisions of the statute and charter of the city, that the city corporation had the capacity to take, and that, as the statute concerning wills did not prohibit it, she could take by devise the same as natural persons. It was further held, that the city could take upon the trusts mentioned in the will, and could execute them subject to the control of the Court of Equity, whose jurisdiction in Missouri was considered to be founded not upon the statute of 43 Elizabeth, but upon the common law.[1]

§ 442. So a bequest to the city of Philadelphia, in trust, to purchase a lot of ground in the city or neighborhood, and erect thereon *a hospital for the indigent, blind, and lame*, and to apply the income of the remainder to the comfort and accommodation of as many of such persons as it will admit of, giving preference to persons resident in Philadelphia or its neighborhood, is valid, since it is in trust for objects within the scope of the corporate duties of the city.[2] Other instances showing the capacity of public corporations to take property and to act as trustees, are given in the note.[3]

[1] Chambers *v.* St. Louis, 29 Mo. 543, 1860.

[2] Mayor, &c. of Philadelphia *v.* Elliott, 3 Rawle (Pa.), 170.

[3] A bequest "to the citizens of W. to purchase a *fire engine*," was regarded as a charitable gift, and sustained, the court considering the name, whether to the corporation or the citizens composing it as immaterial, and that as

§ 443. But municipal corporations cannot, for the same reasons applicable to ordinary corporations aggregate, hold lands *in trust for any object or matter foreign to the purposes* for which they are created, and in which they have no interest.[1] Thus, while the supervisors of a *county*, who are made, by statute, a corporation for special purposes, may take by grant a parcel of land in *trust* that they should erect a court house and jail, these being county purposes; yet they cannot be seized as

the object was meritorious, the testator's intention should be allowed to take effect, notwithstanding any misnomer or other defect in name or form: Wright *v.* Linn, 9 Barr, 433. See Kirk *v.* King, 3 *ib.* 436; School Directors *v.* Dunkelberger, 6 *ib.* 31. As to *name and misnomer*, see *ante*, p. 162, *et seq.*

In Texas it is decided, that a bequest to a county "for the benefit of *public schools*," is not void for uncertainty, and that it is consistent with the object and function of the corporation which may take and administer such a trust. And so of a bequest for the benefit of *indigent persons* residing in the county, counties being charged with the duty of providing for the support of the poor: Bell County *v.* Alexander, 22 Texas, 350, 1858. A school society in Connecticut is a corporation, and as such it is held that it may, upon well settled principles, take a devise or bequest in trust for *educational purposes:* First Congregational Society, &c. *v.* Atwater, 23 Conn. 34, 1854. Bequest held void because the "*school commissioners*" named were not a corporate body: Janey's Executor *v.* Latane, 4 Leigh (Va.), 327, 1833.

A devise to a town of property "to be used by the town in repairing its *highways and bridges* yearly," being in its character both public and charitable, is valid, not only by a special statute in Connecticut, but also, it would seem, without the aid of any special enactment: Hamden *v.* Rice, 24 Conn. 350, 1856; Cogshall *v.* Pelton, 7 Johns. Ch. 292 (bequest to erect town house). See, also, Attorney General *v.* Shrewsbury, 6 Beav. 220. In Ohio, "gifts, grants, and devises to the poor of any township," are, by statute (Swan's Stat. 637), "good and valid in law" when made *directly* to the poor; and they are held to be good when made to a trustee, in trust for the *poor of a township:* Urmey's Executor *v.* Wooden, 1 Ohio St. 160, 1853. Bequest "*to the orphans*" of a municipal corporation sustained: Succession of, &c., 2 Rob. (La.) 438. In Indiana, the statute of 43 Elizabeth, Chap. IV. is in force (McCord *v.* Ochiltree, 8 Blackf. 15), and a devise of real property in a town in that state to be "forever appropriated to the education of ——— children of this town," is within that statute, and valid, and trustees will be appointed by the court to manage the trust: Richmond *v.* State, 5 Ind. 334, 1854.

[1] 1 Plowd. 103; 1 Kyd on Corp. 72. In matter of Howe, 1 Paige, 214, 1828; Trustees *v.* Peaslee, 15 N. H. 317, 331; Farmer's Loan, &c. Co. *v.* Carroll, 5 Barb. 613; Hornbeck *v.* Westbrook, 9 Johns. 73; North Hempstead *v.* Hempstead, 2 Wend. 109; Coggeshall *v.* New Rochelle (legacy for town house), 7 Johns. Ch. 292; Sloan *v.* McConahy, 4 Ohio, 157.

trustees for the use of an individual, or in trust for building a church or school house for the use of the inhabitants of a *particular town* in the county.[1] So a corporation, with authority to establish, in a designated town, an institution "for the instruction of youth," cannot be a trustee under a will or grant to hold funds and pay over the income thereof for the support of missionaries.[2]

[1] Jackson *v.* Hartwell, 8 Johns. 422. See, also, Jackson *v.* Corey, 8 Johns. 385.

"Our laws are full of instances of persons clothed with corporate powers for certain special purposes. The loan officers of a county are a corporation; and could they, as such, receive a grant of land for the use of a town or of a church? Certainly not. Nor can the supervisors of Oneida county take a grant of land for the use of the town of Rome. Such a grant must be deemed void upon every principle, whether we consider the special and defined objects of a corporate capacity in the board of supervisors; whether we consider the power given them by statute, to take conveyances of land for the *use of the county;* or, lastly, whether we refer to the incapacity of all corporations to hold lands in trust for any other object than that for which the corporation was created. Whether the Court of Equity would or would not prevent the trust as to the inhabitants of Rome from failing for want of a trustee, is not a question for a court of law [in an action of ejectment] to decide:" *Per Curiam,* in Jackson *v.* Hartwell, 8 Johns. 422, 1811. Legislature or chancery may, in proper cases, appoint trustees: Bryant *v.* McCandless, 7 Ohio, part 2, 135; Chapin *v.* School District, 35 N. H. 445; Girard Will Case, 2 How. 127; Shotwell *v.* Mott, 2 Sandf. Ch. 46. It was said by Mr. Justice *Story,* in Vidal *v.* Mayor, &c. of Philadelphia, 2 How. (U. S.) 128, that there is "no positive objection in point of law to a corporation taking property upon a trust not strictly within the scope of its institution, but collateral to it; nay, for the benefit of a stranger, or another corporation." See, also, Perin *v.* Carey, 24 How. 465, 1860, *per Wayne,* J. But Chancellor Kent, in stating that a corporation may be a trustee, adds: "And at this day, the only reasonable limitation is, that it cannot be seized of land in trust for purposes foreign to its institution:" 2 Kent Com. 280.

[2] Trustees *v.* Peaslee, 15 N. H. 317, 1844. But towns in New Hampshire, it has been decided, may legally hold funds in trust for the support of religion *within* their limits: The Dublin Case, 38 N. H. 459, 1859. "Such instances," says *Perley,* C. J., giving the judgment of the court (*ib.* p. 577,) "are, it is believed, very numerous in this state." "Under our constitution, no one can entertain a doubt that to maintain the institutions of religion is an object quite consistent with the general purpose for which towns are created, and that towns have at least an indirect interest in promoting religion within their limits."

As towns in Massachusetts were liable, by statute, under a penalty for neglect to support schools (*ante,* p. 34, Sec. 11), and as *parishes* (organizations created for parochial or religious purposes) *may* legally establish schools

§ 444. Whether a municipal corporation, with power to purchase and hold real estate for certain purposes, has acquired, and is holding, such property for other purposes, is a question which can only be determined in a proceeding instituted at the *instance of the state.* If there is capacity to purchase, the deed to the corporation divests the estate of the grantor, and there is a completed sale, and whether the corporation, in purchasing, exceeds its power, is a question between it and the state, and does not concern the vendor or others.[1]

§ 445. Municipal corporations possess the *incidental or implied right to alienate* or dispose of the property, real or personal, of the corporation, of a private nature, unless restrained by charter or statute; they cannot, of course, dispose of property

and raise taxes to maintain them, though not required to do so under a penalty for neglect, as towns are, it was decided by the Supreme Court of that state, that a parish, as well as a town, was capable of taking and holding a devise of real estate, "to be applied for the use of schools:" Parish in Sutton *v.* Cole, 3 Pick. 232, 1825. In this case the court seemed to be of opinion that such corporations could not take or hold real property for purposes *wholly foreign* to the specific objects for which they were created.

[1] Chambers *v.* St. Louis (Mullanphy's devise to city of St. Louis), 29 Mo. 543, 577, 1860; Goundie *v.* Water Company, 7 Pa. St. 233, 1847; Leazure *v.* Hillegas, 7 Serg. & Rawl. 313, 320, 1821; Davison College *v.* Chambers's Executors, 3 Jones Eq. (N. C.) 253, 258, *per Pearson,* J. A corporation cannot *hold* property in violation of its charter, nor can it *take* it in violation of its charter by an *act of the law: Ib.* See Bank, &c. *v.* Niles, 1 Doug. (Mich.) 401. The Banks *v.* Poitiaux, 3 Rand. (Va.) 136; Martin *v.* Bank, 15 Ala. 587; Baird *v.* Bank, 11 Serg. & Rawl. 411; Angell & Ames, Corp. Secs. 152, 153. "If a corporation be forbidden by its charter to purchase or take land, a deed made to it would be void:" *Ib.;* Leazure *v.* Hillegas, 7 Serg. & Rawl. 313. A deed of real estate was made by *Betsey Flagg* to the town of *Worcester,* in consideration of five dollars (nominal), and that the town should support her (she being lawfully settled in the town) while single. The court, without deciding that the acceptance of a deed by the officers of the town the consideration of which imposes upon the inhabitants any expense or burden, would create a binding contract on the part of the town, or that the grantor might not avoid a deed, of which such obligation was the only consideration, held that the town, on the delivery of the deed to it, became seized of the estate, could maintain ejectment against a disseizor, and that the deed would remain good until avoided by the grantor, or by some one in privity of estate: Inhabitants of Worcester *v.* Eaton, 13 Mass, 371, 1816. The court say (*ib.* p. 378), "whether the inhabitants of a town can be assessed to raise money to purchase lands to be used for any other purpose than the execution of some lawful requisition, is a different question."

of a public nature, in violation of the trusts upon which it is held, nor of the public squares, streets, or commons.[1] The distinction is between property which a corporation may own the same as a natural person, and that which it holds in general or special trust. The rights of the corporation as a property holder are distinct from the *legislative* rights of the corporation: the corporation may alien its private property, but it cannot (as elsewhere shown) cede away the power of municipal control.

[1] 1 Kyd, 108; Smith *v.* Barrett, 1 Siderf. 162; 2 Kent Com. 281; Reynolds *v.* Stark County, 5 Ohio, 204, 1831; Augusta *v.* Perkins, 3 B. Mon. 437; Colchester *v.* Lowton, 1 Vesey & Beame, 226; Alvez *v.* Henderson, 16 B. Mon. 131, 168, 1855; Bowlin *v.* Furman, 28 Mo. 427; Kennedy *v.* Covington, 8 Dana, 50; Newark *v.* Elliott, 5 Ohio St. 113, 1855; Ransom *v.* Boal, 29 Iowa, 68, 1870; Angell & Ames, Corp. Sec. 187; Sill *v.* Lansinburg (conveyance of public square void), 16 Barb. 107; Knox County *v.* McComb, 19 Ohio St. 320; Philadelphia *v.* Railroad Company, 58 Pa. St. 253; Holliday *v.* Frisbie, 15 Cal. 630, 1860. *Ante*, Sec. 396.

A corporation may alien land held by it in *fee simple*, though purchased for the use of a common: Beach *v.* Haynes, 12 Vt. 15, 1840. But not, if after its purchase it has dedicated it to the public: State *v.* Woodward, 23 Vt. 92, 1850.

Where an act of the legislature confers upon a corporation the power to *sell* certain property originally donated by the state to the corporation, and enumerates the objects for which such sale may be made, it is not competent for the corporation to dedicate such property to the public use of the citizens: Wright *v.* Victoria, 4 Texas, 375.

Mr. Grant, after an examination of the English authorities, observes that "no decision of the common law courts, directly in point, can be found, laying down the law to be, that to *alien* its real property at pleasure is incident to a corporation:" Grant, 129, 134. But in this country there can be no doubt as to the general *implied authority* of corporations, unless restrained, *to dispose of property* of a private nature: Newark *v.* Elliott, 5 Ohio St. 113; 2 Washb. Real Prop. 588 (2d edition), top. The English Municipal Corporations Act of 1835 imposes certain specific restraints on the right of municipal corporations to alien, mortgage, or lease their real property: 5 and 6 Will. IV. Chap. LXXVI. Sec. 94; Grant, Corp. 140.

A *condition* annexed to a grant of land in fee simple by a city corporation may, as in the case of similar conditions in the deed of an individual, be dispensed with or waived by the grantor, and this as well by acts as by express agreement, and when once dispensed with or waived, it is gone forever: Sharon Iron Company *v.* Erie, 41 Pa. St. 341, 1861. As to breach of condition in a deed of land to be used only as a place for a *town house*: French *v.* Quincy, 3 Allen, 9. A municipal corporation, having by its charter full power to purchase, hold, and convey lands, received, for a valuable consideration, a deed of a parcel of land containing one acre, "*for the use of*

§ 446. In some of the states it is held that the private property of municipal corporations, that is, such as they own for *profit*, and charged with no public trusts or uses, may *be sold on execution* against them.[1] In other states, either by statute, or on general principles, it is declared that judgments against municipal corporations cannot be enforced by ordinary writs of execution, and that the remedy of the creditor is by *mandamus* to compel payment, or the levy of a tax for that purpose. Questions of this kind are influenced much by local legislation.[2] On principle, in the absence of statutable provision, it would seem to be a sound view to hold that the right to contract and the power to be sued gives the creditors a right to recover judgments: that judgments should be enforceable by execution against the strictly private property of the corporation, but not any against property owned or used by the corporation for public purposes, such as public buildings, hospi-

the said town," for the purposes mentioned in the deed: the deed then states, in substance, that it is conveyed for a court house and jail to be erected and kept thereon, with a proviso that if it ceased to be used for such purposes, the property was to re-vest in the grantor: while the land was used by the town for the specified purposes, the title was held to be in the town, and it was also held that the grantor could not interfere to prevent the town from leasing portions of the tract not needed for the purposes specially named in the deed. The court was of opinion that the true construction of the grant was, that while the condition on which the corporation held the lot was not broken, they had full dominion over it, and might use it as they saw fit: Bolling *v.* Petersburg, 8 Leigh (Va.), 224, 1837.

See chapters on Streets and Dedication, *post.*

[1] Holliday *v.* Frisbie, 15 Cal. 630, 1860; Davenport *v.* Insurance Company, 17 Iowa, 276; Louisville *v.* Commonwealth (as to public and private property), 1 Duvall (Ky.), 295. Further see chapters on Dedication and Mandamus, *post.* And an act of the legislature of the state granting to a city certain real property within its limits, with a proviso in the act that the city shall pay into the state treasury, within twenty days after their receipt, twenty-five per cent of all moneys arising from the sale or other disposition of the property, gives to the city an *absolute interest*, qualified by no conditions or trusts attaching to the property, and subject to no specific uses, and hence the property may be levied on and sold under execution: Holliday *v.* Frisbie, above cited.

[2] Crane *v.* Fond du Lac, 16 Wis. 196, 1862; Chicago *v.* Hasley, 25 Ill. 595, 1861; Commonwealth *v.* Allegheny County, 37 Pa. St. 277, 290; Commonwealth *v.* Perkins, 43 Pa. St. 400; State *v.* Milwaukee, 20 Wis. 87; State *v.* Beloit, *ib.* 79, 1865.

tals and cemeteries, fire engines and apparatus, water works, and the like; and that judgments should not be deemed liens upon real property except when it may be taken in execution.[1] Outside of the New England States the creditors of a municipal corporation cannot resort for the purpose of making their debts, to the private property of the inhabitants.[2]

§ 447. If the charter or constituent act of the corporation prescribes a particular *mode* in which *the property* of the corporation *shall be disposed of*, that mode must be pursued. This is well illustrated in an interesting and important series of adjudications in California known as the "City Slip Cases," in which, upon the most sedate and deliberate consideration, it was repeatedly held, where the officers of the city, under the authority of a *void* ordinance, made sales of real estate belonging to the city, that no title passed, and that under the charter of the city (which required sales of its property to be made by an ordinance adopted for the purpose, after advertisement of the time, place, and terms of sale) the appropriation, for municipal purposes, of the proceeds of the sales, while it would impose on the city the liability to pay back to the purchasers the moneys received from them, would not have the effect to ratify the sales.[3]

[1] Schaffer *v.* Cadwallader, 36 Pa. St. 126, 1860; Davenport *v.* Insurance Company, above cited; President, &c. *v.* Indianapolis, 12 Ind. 620; Lamb *v.* Shays, 14 Iowa, 567; Cole *v.* Green, 25 Ill. 104; Green *v.* Marks, 24 Ill. 221. *Post*, chapter on Mandamus.

[2] Horner *v.* Coffey, 25 Miss. (3 Cush.) 434, 1853. The court refused to follow the doctrine laid down in Beardsley *v.* Smith, 16 Conn. 368. *Post*, Chap. XX.

As to exemption of *municipal revenues* from judicial seizure, and as to *garnishment* of municipal corporations, see *ante*, pp. 112–115.

[3] McCracken *v.* San Francisco, 16 Cal. 591, 1860; Grojan *v.* San Francisco, 18 Cal. 590, 1861; Piemental *v.* San Francisco, 21 Cal. 351, 1863. In these cases, the principles stated in the text are vindicated with characteristic clearness and striking logical force in able and interesting opinions of Mr. Chief Justice *Field*, now holding a seat on the Supreme Bench of the United States. See, also, Satterlee *v.* San Francisco, 23 Cal. 314, 1863; Herzo *v.* San Francisco, 33 Cal. 134, 1867. *Ante*, Secs. 373, 383, 384.

See *ante*, Chap. XIV. as to *mode* of contracting. *Mode* of exercising *corporate* powers: *Ante*, Chap. V.; *post*, Chap. XIX.

§ 448. Where property is held by the corporation without restriction, it may doubtless *mortgage* it to secure any debt or obligation that it has the power to create or enter into. The power to mortgage, if not expressly given nor denied, would be an incident to the power to hold and dispose of property, and to make contracts.[1] Power given to the city of Memphis, in its charter, "to hold real, personal, or mixed property," and "to sell, lease, or dispose of, the same, for the use and benefit of the city," was held by the Supreme Court of Tennessee to confer without further legislative authority, and by necessary implication, the power upon the common council of the city of Memphis to mortgage a large tract of land ceded to the city in fee by the United States, lying within the corporate limits, to secure the payment of a large number and amount of bonds to be issued by a railroad company, to aid in the construction of its railroad, one of whose termini was on the bank of the river opposite Memphis, the court regarding this as a proper corporation purpose, and for the benefit of the city.[2] It will be seen that here was no special or express legislative authority to the city to aid in the construction of the railway, and it sought to aid it by pledging its property to secure bonds issued by the railroad company. Without express authority the city could not have guaranteed the bonds of the company; and upon the accepted canons of construction of municipal powers, the author cannot concur with the learned court in the doctrine that the ordinary clause in the charter giving the municipality the authority to take, hold, sell, and dispose of, property, empowered it to pledge it as a security for the bonds or debts of the railway company.[3]

§ 449. It is undoubtedly competent for the legislature to authorize municipal corporations to pass an ordinance providing, in all *leases* of corporate property, that if the rent remain unpaid, the corporation may terminate the lease by a resolution to that effect, in which case equity could not, at least or-

[1] As to power to mortgage real estate: Middleton Bank *v.* Dubuque, 15 Iowa, 394; Braham *v.* San Jose, 24 Cal. 585; Gordon *v.* Preston, 1 Watts (Pa.), 385; Goodwin *v.* McGehee, 15 Ala. 233, 1849.

[2] Adams *v.* Railroad Company, 2 Coldw. (Tenn.) 645, 1866.

[3] See *ante*, Chap. VI. pp. 144–150. *Ante*, p. 386, Sec. 393.

dinarily, relieve against the forfeiture. So such a corporation may, by stipulation in the lease, provide for such a forfeiture, but in this case the right to forfeit owes its existence to the convention of the parties, and not to the action of the corporation in its political or legislative capacity; and where the right to forfeit rests upon *contract*, equity may relieve against it the same as if the contract was made between private individuals.[1]

§ 450. *Conveyances* of real estate should, in general, be *executed in the corporate name* and under the *corporate seal.*[2] If the constituent act or charter prescribes the conditions upon which the conveyance of its real estate shall be made—as, for example, if it requires the previous consent of a majority of the legal voters, a conveyance without such consent is void.[3] A conveyance of real estate, regular on its face, and under the corporate seal, executed by a municipal corporation having

[1] Taylor *v.* Carondelet, 22 Mo. 105, 1855, where this subject is very ably discussed. The dissenting opinion of *Leonard*, J., in the special case in judgment, probably rests upon the most tenable ground. See, also, Woodson *v.* Skinner (power to annul sale), 22 Mo. 13; State of Maryland *v.* Railroad Company, 3 How. (U. S.) 534.

Power to lease: Bush *v.* Whitney, 1 Chip. (Vt.) 369; Angell & Ames, Sec. 191; Grant, Corp. 146; Taylor *v.* Carondelet, 22 Mo. 105. Lease valid, though it does not use precise *corporate name:* McDonald *v.* Schneider, 27 Mo. 405. No particular language essential: Poole *v.* Bentley, 12 East, 168. *Estoppel* of lessee to deny title of corporation lessor: St. Louis *v.* Merton, 6 Mo. 476.

As to necessity of *seal*, see Index,—Seal: Pennington *v.* Tanier, 12 Queen's B. 1011; Grant, Corp. 148. *Ante*, Chaps. VIII. and XIV.

[2] Kent Com. 291. As to name and misnomer, see *ante*, Chap. VIII.; also, De Zeng *v.* Beekman, 2 Hill (N. Y.), 489, 1842; Miners' Ditch Company *v.* Zellerbach, 37 Cal. 543, 1869.

"In general, corporations must *take and convey their lands* and other property in the *same manner as individuals;* the laws relating to the transfer of property being equally applicable to both:" Angell & Ames, Corp. Sec. 193.

[3] Sill *v.* Lansingburg, 16 Barb. 107; Middleton Bank *v.* Dubuque, 15 Iowa, 394. In Vermont, the selectmen of the several towns in which there are Glebe lands, are empowered by statute to *lease* them. This was held to be the extent of their authority, and an absolute conveyance was utterly void, neither conveying title to the grantee nor affecting the rights of the town: Bush *v.* Whitney, 1 Chip. (Vt.) 369, 1821.

As to liability on *covenants of warranty* in conveyances of real estate, to which the municipality had no title or right to convey: Findler *v.* San Francisco, 13 Cal. 534.

the power to dispose of its property, will be presumed to have been executed in pursuance of that power, and hence it is unnecesssary for the grantee or party claiming under it, to produce the special resolution or ordinance authorizing its execution.[1]

§ 451. A town cannot, without express authority, pass the legal title to lands *by a vote*, and when conveyed by an agent under the authority of a vote, regularly, the deed should be in the name of the principal.[2] A corporation in North Carolina was the owner of the land on which the town was laid out; and between front street and the water of the sound there was a small strip of land. After the town was laid out, the corporation passed this ordinance: "*Ordered*, That for the future, whatever small strips of land are to be found between the outward line of front street and the water shall be the property of the person owning the front lot on the opposite side of the street." In *ejectment* by the corporation, it was held that this

[1] Jamison *v.* Fopiana, 43 Mo. 565, 1869; Swartz *v.* Page, 13 Mo. 603, 1850; Choquette *v.* Barada, 33 Mo. 249, 1862; Flint *v.* Clinton County, 12 N. H. 430. See Hart *v.* Stone, 30 Conn. 94.

Conveyances of real property by the officers of a municipal corporation must be made by virtue of a special authority for that purpose: Merrill *v* Burbank, 23 Maine, 538, 1844. *How given:* Clark *v.* Pratt, 47 Maine, 55; Hascard *v.* Somamy, Freem. 504; Grant, Corp. 146. *Requisites and proof of corporate conveyances:* Osborn *v.* Tunis, 1 Dutch. (N. J.) 633, 658; Lovett *v.* Steam, &c. Association, 6 Paige, 54; Hamilton *v.* Railroad Co. 9 Ind. 359; Middleton Bank *v.* Dubuque (deed by mayor *pro tempore*), 19 Iowa, 467; Gourley *v.* Hawkins, 2 Iowa, 75.

[2] Cofran *v.* Cochran, 5 N. H. 458, 1831; Coburn *v.* Ellemwood, 4 N. H. 99, 102, and cases cited. As to title under a vote, where possession is taken, see Copp *v.* Neal, 7 N. H. 275, 278, and authorities cited. In Ward *v.* Bartholomew, 6 Pick. 409, it was held that a conveyance of land by an individual as an agent of the commonwealth under a resolve authorizing him to convey, might be sufficient even if the deed was executed in the name of the agent. And in Cofran *v.* Cochran, *supra*, it was determined that from long usage, and in view of the great public mischief which would be produced by a contrary holding, land might be conveyed by a deed in the name of a duly authorized agent of the town. This decision is expressly put upon the maxim "*Communis error facit jus.*" Special legislative authority to certain "*trustees*" (declared to be a body corporate) to sell a lot is well executed by a deed in which the grantors describe themselves properly as the "*trustees*," and then sign and seal the conveyance in their individual names: De Zeng *v.* Beekman, 2 Hill (N. Y.), 489, 1842.

ordinance did not operate as a deed to pass the title: *first*, for the want of the seal of the grantors; *second*, for the want of a consideration; and *third*, for the want of delivery. Not only so, but it was held to be so obviously defective as a conveyance as not to give the "color of title" to the defendant, necessary (under the statute and decisions of North Carolina) to support an adverse possession.[1]

[1] Beaufort *v.* Duncan, 1 Jones (N. C.), Law, 239, 1853. But a release by a municipal corporation of a right in real property, by ordinance and not by deed, may be enforced in equity, when within the scope of the corporate power, and the releasee has paid the consideration, or entered into possession and made valuable improvements on the faith of it: Grant *v.* Davenport, 18 Iowa, 179, *obiter*, *per Wright*, C. J.

CHAPTER XVI.

Eminent Domain.

§ 452. Among the important powers usually conferred upon municipal corporations and deserving separate treatment, is the authority to exercise, by delegation from the legislature, the right of Eminent Domain; that is, compulsorily to take private property, on making compensation in the prescribed mode, for designated municipal or public purposes. In this chapter the general nature of the power; the constitutional restrictions upon it; the principles which govern the construction and application of the legislative authority necessary to its existence and exercise by public agencies; the mode and measure of compensation to the property owner, will be considered with special reference to the power and the purposes for which it is commonly delegated to municipal corporations.[1]

§ 453. Social duties and obligations are paramount to individual rights and interests. Private rights not under the shield of the organic law must yield when they come in conflict with public necessity or the general good. The maxim, *salus populi suprema lex*, has an important meaning in its appli-

[1] In the tenth chapter of the valuable work of Judge *Redfield* on the Law of Railways, and particularly in the last edition, the right of Eminent Domain, in connection with Railways, is exhaustively treated, and may be usefully consulted by whoever desires to have a view of the present state of the English and American law upon almost any branch of this interesting inquiry. The learned author does not confine his consideration of the subject to its bearings on railways, but the nature of the right, the limitations upon its exercise, the mode of procedure, the time when compensation is to be made, and the rules to measure its amount are clearly stated and fully illustrated.

In his excellent work on Constitutional Limitations, chapter fifteen, Judge *Cooley* has presented the subject, particularly in its constitutional aspects, in a manner extremely satisfactory. Mr. *Sedgwick's* view, although less practical, will be found to be of great interest and value: Sedgwick on Stat. and Const. Law, 498—534.

cation to private rights, and in limiting the absoluteness of any possible ownership of private property. The legislature as the authoritative representative of the public, and the constituted judge of what is demanded by the general weal, has the right to say, under such constitutional restrictions as may exist in the particular state, to every private proprietor, "the public needs of your property thus much," and the individual must submit. This is a right inherent in every government. It is a tremendous power, and one which is without theoretical limits, and indeed, without any legal limitations except such as may exist in written organic restraints upon legislative action. It has, in addition, practical limitations in the sense of justice, which ever prevails in enlightened communities, and which legislators cannot for any considerable period effectually or safely disregard; and experience has shown that there is a point beyond which no government can press its demands upon its subjects or citizens and continue to exist. One branch of this governmental prerogative is known by the name of *Taxation*, which, in its application to municipalities, will be noticed in another chapter; and the other arm of this transcendent and underlying authority is now familiarly known as the power of *Eminent Domain*, by which is meant the right of every government to appropriate, otherwise than by taxation and its police authority (which are distinct powers), private property for public use.[1]

§ 454. In the *constitution of the United States*, and in the constitutions of the different states, there is a *limitation upon the power* of eminent domain, usually expressed in substantially these words: "Private property shall not be taken for public use without just compensation." In some of the constitutions there are, in addition, special provisions of more recent origin, as to the mode of ascertaining the amount of the compensation and the time and manner of payment. Full treatment of this subject in its constitutional and other aspects would not be appropriate to the present work, and our consideration of it

[1] As to the phrase *Eminent Domain*, see Mr. Justice *Campbell's* article on the "Taking of Private Property for Purposes of Utility:" Vol. I. No. 2, Bench and Bar, p. 112.

will accordingly be limited to a statement of the general principles relating to it, and a reference to the cases which illustrate the power as exercised by municipal corporations under delegated legislative authority.[1]

§ 455. Mr. *Sedgwick* sums up his interesting examination of the *limitations upon the power* of the legislature over the appropriation of private property to public uses, and his statement of the result will serve as an appropriate introduction to our consideration of the subject in its application to municipal corporations. He says: "If the brief and sweeping clause, 'Private property shall not be taken for public use without just compensation,' be made to express the modifications and qualifications which construction has inserted in it and added to it, it will stand nearly as follows: Private property shall in no case be taken for *private* use. Private property may be taken for public use in the exercise of the general police powers of the state, or of taxation, without making compensation therefor. And the power of taxation includes the power of charging the expense of local improvement exclusively upon those immediately ben-

[1] The fifth article of the amendments of the constitution of the United States was intended to prevent the general government from taking private property for public use without just compensation, and was *not* intended as a restraint upon the *state* governments: Barron *v.* Baltimore, 7 Pet. 243, 1833; Withers *v.* Buckley, 20 How. (U. S.) 84, 1857. The right of eminent domain residing in a state, says the Supreme Court of the United States, is an independent power, and all property is held, and all contracts are made subject to this right. Therefore, the exercise of this right by the state does not impair the obligation of contracts within the meaning of the prohibition of the constitution of the United States. Hence a toll bridge owned by a private corporation, chartered by the state for that purpose, may, under the right of eminent domain, and under a general law of the state authorizing the act, be condemned and taken as part of a public road, compensation being made to the corporation in the same manner as to natural persons. Such an exercise of the right of eminent domain does not impair the obligation of the contract between the bridge corporation and the state: West River Bridge Company *v.* Dix, 6 How. (U. S.) 507, 1848, affirming judgment of the Supreme Court of Vermont; Railroad Company *v.* Railroad Company, 13 How. 71. The *same principle* has been frequently declared by the *state courts:* Railroad Company *v.* Kennedy, 39 Ala. (N. S.) 307; Toll Bridge Company *v.* Railroad Company, 17 Conn. 40; *ib.* 454; Railroad Company *v.* Railroad Company, 2 Gray, 1; Bridge Company *v.* Lowell, 4 Gray, 474; Bridge Company *v.* Clarksville, 1 Sneed, 176; Armington *v.* Barnet, 15 Vt. 745; Redfield on Railways, Sec. 70.

efited thereby. Private property may also be taken for public use in the exercise of the power of eminent domain, but not without just compensation being made or provided for before the taking is absolutely consummated. The right of compensation, however, does not attach in cases where the value of property is merely impaired and title to it not divested; nor does it exist in cases where the right to the property taken is not absolutely vested at the time of the legislative act affecting it. This is substantially the form that the constitutional provision has assumed in the hands of the courts; and upon a careful examination of the process by which this result has been arrived at, it must be admitted that in practice our constitutional guarantees are very flexible things, and that the judicial power exerts an influence in our system which makes the subject of interpretation one of the first magnitude."[1]

§ 456. As the legislature is the sole judge of the necessity which requires or renders expedient the exercise of the power of eminent domain without the owner's consent, so it is the exclusive judge of the *amount* of land or *the estate in land* which the public end to be subserved requires shall be taken. But as the right originates in necessity, so it is limited by it. The principle and its limitations have found interesting illustrations in cases which we shall notice, arising under powers conferred upon municipalities to enable them to execute certain public purposes. The legislature has the constitutional power expressly to authorize a municipal corporation *compulsorily* to acquire *the absolute fee simple* to lands of private persons, required for public use, upon the payment of a just compensation.[2] Accordingly, a statute "to enable" a city "to

[1] Sedgwick, Stat. and Const. Law, 533, 534. It is not competent for the legislature to provide if a person shall make *improvements upon ground which will be embraced in a street*, if subsequently laid out and extended, that he shall not, if such street is subsequently laid out, be entitled to damages for such improvement. Such a provision is unconstitutional, because it deprives the owner of the use of his land, without compensation: Moale *v.* Baltimore, 5 Md. 314, 1854.

[2] Heyward *v.* Mayor, &c. of New York, 7 N. Y. (3 Seld.) 314, 1852, affirming S. C. 8 Barb. 486; distinguished from Embury *v.* Connor, 3 Comst. 511, where an *unnecessary amount* was sought to be taken; S. P. Dingley *v.* Boston, 100 Mass. 544, 1868. So in North Carolina it is held that the legislature

abate a nuisance and for the preservation of the public health," authorized the city to "purchase or otherwise take lands" within a large district, on payment of damages to the owners, and which directed the city to raise and drain the same, so as "to abate the present nuisance thereon," and declaring, further, that the "title to all land so taken shall vest in the city," was held to *vest the fee* of such lands in the city, and was not unconstitutional, because it authorized the taking of a greater interest in the land than was necessary, nor as an attempt to exercise judicial power.[1] To land *the fee simple of which is thus acquired* by a municipal corporation, its title is perfect, and *it does not revert* when sold by the corporation, or when the public good, in the opinion of the corporate authorities, requires the land to be used for other purposes than those for which it was originally obtained.[2]

§ 457. The cases which have established that the legislature may, if it sees proper, authorize the compulsory appropriation of the fee, are to be distinguished from those in which it has been held that *no more in amount of private property* can be taken than the legislature has declared to be necessary to the accomplishment of the public purpose in view, even although compensation be made. It was accordingly decided in South Carolina, on sound principles, that the state cannot authorize part of a lot to be taken for a street, and, in addition, compel the owner, against his will, to part with the balance for the benefit, emolument, or private purposes of the corporation, since,

may authorize not simply the *use*, but the *entire interest* of the owner to be taken for public use, if it deem the public exigency requires it: Railroad Company *v.* Davis, 2 Dev. & Bat. (Nor. Car.) Law, 451, 1837; De Varaigne *v.* Fox, 2 Blatchf. C. C. 95; Kane *v.* Baltimore, 15 Md. 240, *arguendo*. See, also, Moore *v.* Same, 8 Md. 110 (power over dower interest); Matter of John and Cherry Streets, 19 Wend. 650 (as to reverter of discontinued streets to adjacent owners); Kimball *v.* Kenosha, 4 Wis. 321. *Infra*, Sec. 468.

[1] Dingley *v.* Boston, 100 Mass. 544, 1868.

[2] Heyward *v.* Mayor, &c. of New York, 7 N. Y. (3 Seld.) 314, 1852; De Varaigne *v.* Fox, 2 Blatchf. C. C. 95, 1848; Heirs of Reynolds *v.* Commissioners, &c. 5 Ohio, 204, 1831; Le Clercq *v.* Gallipolis, 7 Ohio, part I. 218, 1835. See, also, chapter on Corporate Property, *ante*, and on Dedication, *post*.

in the opinion of the court, such an act "disseizes or deprives" the owner of his property, "without the judgment of his peers," and contrary "to the law of the land." [1]

§ 458. And the *same principle* was subsequently declared by the Supreme Court and by the Court of Appeals of the state of New York, and of the state of Maryland.[2] The constitution of the state of New York contained the provision that "no person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." The legislature enacted, with reference to the city of New York, that whenever *part* only of a lot should be required for a street, the commissioners for assessing compensation might, if they deemed it expedient, include the *whole* lot, and that the part not required for the street should, upon confirmation of their report, be vested in fee in the city, with authority to appropriate it to public uses, or if not thus appropriated, to sell it. The court inclined to the opinion, that the legislature did not intend by this provision to authorize the compulsory taking of more land than the public needed, and that the statute should be construed so as to require the *owner's consent* to the appropriation of the part not required for the public use. But the court expressly decided that if the statute did intend to authorize the compulsory taking of the whole, when part only was required for the use of a street, it would be in conflict with the above provision of the constitution of the state guaranteeing protection to private property. It was, however, further adjudged, that the owner's consent to the appropriation would remove all objections on the ground of the unconstitutionality of the statute;

[1] Dunn *v.* Charleston, Harper (South Car.), Law, 189, 1824. This decision is right. Other cases in South Carolina, holding that private property may be taken for streets, roads, &c. against the owner's consent and *without compensation* (State *v.* Dawson, 3 Hill (South Car.), 100, and cases cited), are not elsewhere regarded as law: Sedgwick on Stat. and Const. Law, 494. In Patrick *v.* Commissioners, 4 McCord, 540, 1828, it was held that the legislature might authorize a street to be laid out on private property without making compensation.

[2] Albany Street (in matter of) 11 Wend. 148, 1834; Embury *v.* Conner, 3 N. Y. (3 Comst.) 511, 1850; reversing S. C. 2 Sandf. 98; Baltimore *v.* Clunet 23 Md. 449, 1865.

that such consent need not be in writing, and that the receipt by the owner of damages allowed by the commissioners, is evidence of his consent.[1]

[1] Referring to this statute, in Embury *v.* Conner, *supra*, *Jewett*, J., delivering the opinion of the Court of Appeals, says: "It needs no argument to show that the end and design of this section was not to take private property for the use of the public. It manifestly goes upon the ground that the property so authorized to be taken is not wanted for the purpose of forming or improving a street, the object in view for which the proceedings are instituted. In the Matter of Albany Street, 11 Wend. 148, the constitutionality of this enactment came directly under the consideration of the Supreme Court, on application to confirm the report of the commissioners in that matter. The court then held, that if that provision was intended merely to give to the corporation *capacity* to take property under such circumstances, with the *consent* of the owner, and then to dispose of it, there could be no objection to it. But if it was to be taken literally, that the commissioners might, against the consent of the owner, take the whole lot, when only a part was required for public use, and the residue to be applied to private use, it assumed a power which the legislature did not possess.

"This decision went mainly upon the application contained in the last member of the clause of section 7 of Article 7 of the constitution of 1821, that 'No person shall be deprived of life, liberty, or property, *without due process of law;* nor shall private property be taken for public use without just compensation.' Chief Justice *Savage* said: 'The constitution, by authorizing the appropriation of private property to public use, impliedly declares, that for any other use, private property shall not be taken from one and applied to the private use of another.' In Bloodgood *v.* The Mohawk & Hudson Railroad Company, 18 Wend. 59, Mr. Senator Tracy said the words should be construed, 'As equivalent to a constitutional declaration that private property, without the consent of the owner, shall be taken *only* for the public use, and then only upon a just compensation.' *Bronson*, J., in Taylor *v.* Porter, 4 Hill, 147, in reference to this question, said, that although he felt no disposition to question the soundness of these views, yet that it seemed to him that the case stood stronger upon the first member of the clause, 'No person shall be deprived of life, liberty, or property, *without due process of law.*' That the words, 'due process of law,' in that place, could not mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property. The same doctrine was held in the Matter of John and Cherry Streets, 19 Wend. 659, and by the chancellor in Varick *v.* Smith, 5 Paige, 137, and was admitted by all the members of the court for the correction of errors, whose opinions have been reported in the case referred to, of Bloodgood *v.* The Mohawk & Hudson Railroad Company. I think these decisions should be regarded as having settled the point, that a statute is unconstitutional and void which authorizes the transfer of one man's property to another without the consent of the owner, although compensation is made. The late Chancellor Kent, in reference to

§ 459. As *dower* is not the result of contract, but is a positive legislative institution, it is constitutionally competent for the legislature to authorize lands to be taken by a municipal corporation for a market, street, or other public use, upon an appraisement and payment of their value to the husband, the holder of the fee, and such taking and payment will confer an absolute title divested of any inchoate right of dower.[1] Nor is a widow *dowable in lands dedicated* by her husband in his lifetime to the public, where the dedication is complete or has been accepted and acted upon by the municipal authorities. Therefore, where the husband agreed to open a street through his property upon which a market-house was to be erected, and which was accordingly erected under an ordinance of the city, his widow was decided not to be entitled to dower in the

the decision in Taylor *v.* Porter, says: 'I apprehend that the decision of the court was founded on just principles, and that, taking private property for *private* uses without the consent of the owner, is an abuse of the right of eminent domain, and contrary to fundamental and constitutional doctrine in the English and American law (2 Kent Com. 5th ed. note *c*, 340). But it is insisted, that as the enactment is only held to be void on the ground that it takes private property for private uses against the owner's consent, if the consent be given, all objection on the ground of unconstitutionality is removed. The decisions to which I have referred proceed upon that principle, and Mr. Justice *Bronson*, in Taylor *v.* Porter, in terms, concedes that the objection has no application when the owner consents. If we read the statute in question, with the proviso that the owner consent, and I think we should, that consent removes all obstacles, and lets the statute in to operate the same as if it had in terms contained the condition."

That such is the *effect of consent*, see Sedw. on Stat. and Const. Law, 111, and Mr. Justice *Cooley's* opinion, Const. Lim. 541, note; Baltimore *v.* Clunet, 23 Md. 449,1865.

That *voluntary acceptance of money*, with knowledge of all the facts, in the absence of fraud or mistake of fact, will estop the party so accepting from afterwards objecting: See Pursley *v.* Hays, 17 Iowa, 310; Deford *v.* Mercer, 24 Iowa, 118; 2 Smith Lead. Cas. (5 Am. Ed.) 662; Commonwealth *v.* Sherman's Administrators, 18 Pa. St. 343; Burns *v.* Railroad Company, 9 Wis. 450; Smith *v.* Warden, 19 Pa. St. 426; Thillate *v.* Stanley, 14 Ind. 409, 412. *Actual receipt of damages* by party entitled is a waiver of delay in depositing or paying it, and a ratification of the proceedings of the city in laying out the streets for public use: Hawley *v.* Harrall, 19 Conn. 142, 151.

Confirmation of *defective proceedings* by legislative authority: Yost's Report, 17 Pa. St. 524; Bennett *v.* Fisher, 26 Iowa, 497, 1868; compare, Baltimore *v.* Horn, 26 Md. 194, 1866. *Ante*, p. 92.

[1] Moore *v.* Mayor, &c. of New York, 8 N. Y. (4 Seld.) 110, 1853.

ground covered by the market-house. The court was of opinion that the case was not to be distinguished from the ordinary one of a condemnation of land to public uses, and that such uses are inconsistent with the existence of private rights which could be enjoyed only by interfering with the rights of the public.[1]

§ 460. It is agreed that individual property can be compulsorily appropriated by the public *only for public use.*[2] What is a public use has, in some aspects of the subject, given rise to much controversy, particularly in reference to the delegated exercise of the power by, or for the benefit of, private corporations, companies, and individuals. Since municipal corporations are instituted for public purposes, authority to take property in order to carry out their chartered powers is not often open to the objection that the use is private and not public. Municipal uses proper are public uses. Highways are conceded to be, and manifestly are, matters of public concern, and hence the condemnation of property for streets, alleys, and public ways is, undeniably, for a public use.[3]

§ 461. The mere fact that *individuals have subscribed money*, or given a bond to a city or town, to contribute towards the expense of laying out or altering a street, will not vitiate the proceedings, or afford evidence that the land was taken for the accommodation of private individuals, and not for public uses.[4] But if such a bond was made the basis of the proceedings,[5] or

[1] Gwynne *v.* Cincinnati, 3 Ohio, 25, 1827. *Post*, Sec. 498.

[2] One of the most acute and able of American jurists maintains, in an interesting article, that the right to take private property for purposes of utility rests not in public *uses*, but on public *policy*, or the law of *necessity*. Mr. Justice *Campbell*, Vol. I. No. 2, p. 97, Bench and Bar. See, in same publication, Vol. I. No. 1, p. 1, Prof. Washburn's article on "Taxation to Build Railroads," and an able article in Am. Law. Rev. Oct. 1870.

[3] *Per Woodbury*, J., in West River Bridge Company *v.* Dix, 6 How. (U. S.) 545; Angell on Highways, Sec. 86; Arnold *v.* Bridge Company, 1 Duvall (Ky.), 372; United States *v.* Bridge Company, 6 McLean, 517; Redfield on Railways, Sec. 63.

[4] Parks *v.* Boston, 8 Pick. 218, 1829. Copeland *v.* Packard, 16 *ib.* 217. *Ante*, Sec. 382.

[5] *Ib.*; Commonwealth *v.* Sawin, 2 Pick. 547, 1824; Freeport *v.* Bristol, 9 Pick. 46, 1829.

if the street was laid out or widened, "colorably," to use the expression of *Parsons*, C. J., "for the use of the city, but really, for the benefit of the individual" giving or procuring the bond, the proceedings would be set aside.[1]

§ 462. It is an authorized, and frequently wise and just exercise of the right of eminent domain, to empower towns and cities to take, upon compensation being made, private property for the purpose of supplying the inhabitants with *pure water*. This is clearly a public use.[2]

§ 463. On the ground that the public health, convenience, and welfare will be thereby promoted, the legislature may authorize the condemnation of private property for the pur-

[1] Commonwealth *v.* Cambridge, 7 Mass. 166, 167, 1810; Parks *v.* Boston, *supra;* Crockett *v.* Boston, 5 Cush. 182, 190, 1849, where the above cases are commented on. *Ante*, Sec. 382.

[2] Wayland *v.* County Commissioners, 4 Gray, 500, *per Thomas*, J., 1855; Burden *v.* Stein, 27 Ala. 104, 1855. See Same *v.* Same, 25 *ib.* 455; Reddall *v.* Bryan, 14 Md. 444, 1859; Gardner *v.* Newbury, 2 Johns. Ch. 162; Ham *v.* Salem, 10 Mass. 350. In the act to supply the city of New York with pure and wholesome water, the city, under right of eminent domain, was authorized to take private property many miles distant from the corporate limits. Although regarded as going very far, it was not contended that the legislature had exceeded its power: Mayor, &c. of New York *v.* Bailey, 2 Denio, 433, 446, 1845, *per Hand*, Senator. In the case of Kane *v.* Baltimore, *infra*, it is held that when property is compulsorily taken by the exercise of the right of eminent domain, for a *specific public use*, as, for example, supplying the city with water, the city is limited to such use, all other rights not interfering therewith being left with the owner. It was not denied, however, that the power to condemn, in *fee simple*, might, if necessary to carry out the public end designed, be conferred by the legislature: Kane *v.* Baltimore, 15 Md. 240, 1859, *Tuck*, J., dissenting.

It is not within the corporate powers of a city to open streets on lands within the corporate limits, belonging to the United States, and which has never been sold to private persons: United States *v.* Chicago, 7 How. (U. S.) 185. Private property, it was admitted by the Maryland Court of Appeals, can only be taken for "*public* use;" but the words "public use" were considered to mean not merely a use by the state, or the inhabitants thereof, but embrace a use for the government of the United States; and therefore, a statute of the state of Maryland, authorizing the expropriation of land in that state, for the purpose of supplying the city of Washington with water, was held constitutional: Reddall *v.* Bryan, 14 Md. 444, 1859. See, on this subject, Cooley Const. Lim. 525, 526, and note; Gilmer *v.* Lime Point, 18 Cal. 229; 19 *ib.* 47.

pose of using the same for a *public park*,[1] or *public square*,[2] or for the construction of *drains* and *sewers*.[3] So, for the same reasons, a municipal corporation may be designated as the public agency to "purchase or otherwise take lands," within a large district, on compensation being made, in order to *raise and drain* them so as to abate an existing nuisance thereon.[4]

§ 464. It has been said since public necessity is the *basis* of the right of eminent domain, that the right cannot be exercised except where the purpose is *useful;* and therefore, that property cannot be compulsorily acquired against the owner's consent when wanted merely for *ornamental* purposes.[5] If it

[1] Central Park Extension (matter of), 16 Abb. Pr. 56; Park Commissioners *v.* Williams, 51 Ill. 57.

[2] Owners, &c. *v.* Albany, 15 Wend. 374, 1836. In this case, the legislature authorized the condemnation of property for a *public square* in the city of Albany, and required the damages to the land owners whose property was taken to be apportioned amongst the owners of ground to be benefited. The Court sustained the validity of the enactment, and held that the taking of ground for such a purpose was as much a public use as if taken for a street, and that the mode of compensation (by an assessment of benefits instead of a general tax) was unimportant, and no evidence that the use is not a public one.

[3] Hildreth *v.* Lowell, 11 Gray, 345.

[4] Dingley *v.* Boston, 100 Mass. 544, 1868. *Supra*, Sec. 456; Draining Company Case, 11 La. An. 338. In Reeves *v.* Treasurer of Wood County, 8 Ohio St. 333, 345, 1858 a law, authorizing an entry upon private property, and the construction of drains when demanded by private and not by public interest, was adjudged void. Approving: Matter of Albany Street, 11 Wend. 149; Bloodgood *v.* Railroad Company, 18 Wend. 9, 59; Varick *v.* Smith, 5 Paige, 137; Sedgw. on Const. Law, 514, 515. See, also, Cooley Const. Lim. 533; People *v.* Nearing, 27 N. Y. 306; Anderson *v.* Draining Company, 14 Ind. 199; Talbot *v.* Hudson, 16 Gray, 417.

[5] Angell on Highways, Sec. 85; Smith, Commentaries on Stat. and Const. Law, Sec. 335. By the Supreme Court of Vermont it is said that highways and streets cannot be laid out for the mere purpose, or mainly, for the purpose of *embellishing and ornamenting* the grounds about a public building, but that these results may be taken into consideration, in connection with the public convenience and necessity; if the latter exist, the resulting incidental embellishment will not render the establishment of the highway or street illegal: Woodstock *v.* Gallup, 28 Vt. (2 Wms.) 587, 1856; S. C. 29 *ib.* 347. See, on the general subject, the opinion of *Woodbury*, J., in West River Bridge Company *v.* Dix, 6 How. 545, where the subject of eminent domain is ably examined. In the case last referred to this learned Judge, in the course of his opinion, observes: "When we go to other public uses,

be admitted that in a given case the ornamental purpose is not associated with any useful purpose, this would probably be correct. But if land for public squares and parks, which are largely for ornament, may be assumed by the state, upon payment to the owner, it would be difficult to hold an act unconstitutional which authorized the condemnation of land for a public fountain, or as a site for a monument. These questions, however, lie upon the boundary of legislative power, and have not been very fully illustrated by actual adjudications.

not so urgent, not connected with precise localities, not difficult to be provided for without the power of eminent domain, and in places where it would be only convenient, but not necessary, I entertain strong doubts of its applicability. Who ever heard of laws to condemn private property for public use, for a marine hospital or state prison? So a custom house is a public use for the general government, and a court house or jail for a state. But it would be difficult to find precedent or argument to justify taking private property, without consent, to erect them on, though appropriate for the purpose. No necessity seems to exist, which is sufficient to justify so strong a measure. A particular locality as to a few rods in respect to their site is usually of no consequence; while as to light-house, or fort, or wharf, or highway between certain termini, it may be very important and imperative. I am aware of no precedents, also, for such seizures of private property abroad, for objects like the former, though some such doctrines appear to have advanced in this country." See, also, Boston Mill Corporation *v.* Newman, 12 Pick. 476; Cooley Const. Lim. 531, 533; Dunn *v.* Charleston, Harper (S. C.), Law, 189, 1824; Bankhead *v.* Brown, 25 Iowa, 540; Eldridge *v.* Smith, 34 Vt. 484.

The legislature incorporated the "Memphis Freight Company," giving to it "the privilege of loading and unloading freight, goods, and other property on boats that may touch at the port of Memphis: of erecting on the bank of the Mississippi river, in the city of Memphis, such sheds, railroad tracks, engines, and their equipments, as may be necessary for hauling freight;" no right was given to the public to use the property or privileges given to the company, and no right of legislative regulation of tolls was reserved. It was held that this company organized for private advantage and profit, could not be invested with the right to condemn property, against the owner's consent, to lay down a railroad track from the streets of the city to the margin of the river, for the reason that the use was not a public use, within the meaning of the constitution. It will be noticed that "The Promenade," over which the right of way was sought, is treated by the case as the private property of the city of Memphis. There is, however, no discussion of the question as to the legislative power over property thus dedicated: Memphis Freight Company *v.* Memphis, 4 Coldw. (Tenn.) 419, 1867.

§ 465. Of the *necessity or expediency* of exercising the right of eminent domain in the appropriation of private property to public uses, the opinion of the legislature, or of the corporate body or tribunal upon which it has conferred the power to determine the question, is conclusive upon the courts, since such a question is essentially political in its nature, and not judicial.[1] But the question whether the specified use is a public use or purpose, or such use or purpose as will justify or sustain the compulsory taking of private property, is, perhaps, ultimately a judicial one, and, if so, the courts cannot be absolutely concluded by the action or opinion of the legislative department. But if the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably private, or the necessity for the taking plainly without reasonable foundation.[2] But if the use is public, or if it be so doubtful that the courts cannot pronounce it not to be such as to justify the compulsory taking of private property, the decision of the legislature, embodied in the enactment giving the power, that a necessity exists to take the property, is final and conclusive.[3]

[1] People *v.* Smith, 21 N. Y. 597: Giesy *v.* Railroad Company, 4 Ohio St. 308; Varick *v.* Smith, 5 Paige, 137.

[2] Commonwealth *v.* Breed, 4 Pick. 463; Hazen *v.* Essex County, 12 Cush. 477; Bankhead *v.* Brown, 25 Iowa, 540; Hanson *v.* Vernon, 27 Iowa, 28; Concord Railroad *v.* Greely, 17 N. H. 47; 2 Kent Com. 340; Memphis Freight Company *v.* Memphis, 4 Coldw. (Tenn.) 419, 1867; Taylor *v.* Porter, 4 Hill (N. Y.), 142; Cooley, Const. Lim. 530, *et seq.* Speaking of this subject, *Shaw*, C. J., says: "It is contended that if this act was intended to authorize the defendant company to take the mill power and mill of the plaintiff, it was void, because it was *not taken for public use*, and it was not within the power of the government in the exercise of the right of eminent domain. This is the main question. In determining it, we must look to the declared purposes of the act; and if a public use is declared, it will be so held, unless it manifestly appears by the provisions of the act that they can have no tendency to advance and promote such public use:" Hazen *v.* Essex County, *supra*. *Infra*, Sec. 468.

[3] Same authorities last cited; Talbot *v.* Hudson, 16 Gray (Mass.), 417. The language of the text of this section is guarded, and the view there intimated is the safe and, perhaps, the sound one. The citizen is more secure in his rights where the ultimate decision respecting the *use* or *right to take* is left to deliberate, unimpassioned, and conservative judgment of the courts; but if the power of eminent domain rests alone upon the basis of the public necessities or of public policy, it seems somewhat difficult to maintain that the legislative determination of this question is not conclusive.

§ 466. In exercising the power of eminent domain, the city council need not preface their laying out of a highway or street by declaring that they find the same to be necessary or expedient. This *necessity is sufficiently implied in their action* on the subject, inasmuch as they can act only in such a case. They need not record their motives where they have jurisdiction to act. It might be otherwise, were their jurisdiction made to depend upon their first finding a preliminary fact to be true.[1]

§ 467. The legislature, instead of directly exercising the power to take private property for public use, *may delegate it*, attended, however, by its constitutional restrictions, to private corporations organized for public purposes, and of course, therefore, to municipal corporations, which are, for all purposes of local government, essentially public in their nature and ends; and it may, also, confer upon them the right to decide upon the existence of the necessity for its exercise. Thus a municipal corporation may be constitutionally invested with the power to open and establish, by compulsory acquisition or by purchase, such streets as its council may judge expedient or necessary.[2]

[1] Townsend *v.* Hoyle, 20 Conn. 1, 9, 1849, *per Ellsworth*, J. A finding, by the city authorities, that "public convenience requires" the laying out of a street, is equivalent to a finding that it is "necessary" in the sense of the statute: Hunter *v.* Newport, 5 Rh. Is. 325; Watson *v.* South Kingston, *ib.* 562. See chapter on Ordinances, *ante*, p. 278, Sec. 252.

[2] People *v.* Smith, 21 N. Y. 595, 1860; Wilson *v.* Marsh County, 2 Pet. 251; Bloodgood *v.* Railroad Company, 18 Wend. 9; West River Bridge Company *v.* Dix, 6 How. 183; Mercer *v.* Railroad Company, 36 Pa. St. 99; Commonwealth *v.* Charleston, 1 Pick. 180; Scudder *v.* Trenton, &c. Falls Co. Saxt. (N. J.) 694; Harbeck *v.* Toledo, 11 Ohio St. 219; Shaffner *v.* St. Louis, 31 Mo. 264; Swan *v.* Williams, 2 Mich. 427; Embury *v.* Conner, 3 Comst. 511, 1850; Alexander *v.* Baltimore, 5 Gill, 383; Sedgw. on Stat. and Const. Law, 517. The expediency of exercising the power usually given to open streets is generally left solely to the judgment of the governing body of the corporation: Curry *v.* Mt. Sterling, 15 Ill. 320, 1853. Power may be delegated to local authorities to determine the expediency of building a bridge over a creek: Commonwealth *v.* Charlestown, 1 Pick. 180. Streets may be established by direct action of the legislature as by ordering a survey of a town to be made, and declaring the map to be a public record. Such streets are public highways without being formally opened or used: West *v.* Blake, 4 Blackf. (Ind.) 234, 1836.

§ 468. Whether the power be exercised directly by the legislature, or mediately through municipal corporations or other public agencies, the *purpose or use* for which private property is authorized to be appropriated *should be specified* by the legislature, and the power will not be enlarged by doubtful construction.[1] Therefore, authority to a city corporation to appropriate private property for streets, lanes, alleys, and public squares or grounds, does not confer the power, compulsorily, to take private property upon which to erect a city prison.[2] So where the purpose for which land is to be taken is as well met by construing the authority to warrant the taking of an easement only as of the fee, the grant, if doubtful, will be construed most favorably for the citizen.[3]

§ 469. Not only must the authority to municipal corporations, or other delegated legislative agents, to take private property, be expressly conferred, and the use for which it is taken specified, but *the power*, with all constitutional and statutory limitations and directions for its exercise, *must be strictly pursued.* Since the power to condemn private property against the will of the owner is a stringent and extraordinary one, based upon public necessity or an urgent public policy, the rule requiring the power to be strictly construed, and the pro-

[1] Claiborne Street (matter of), 4 La. An. 7; Exchange Alley (matter of), 4 La. An. 4; East St. Louis *v.* St. John, 47 Ill. 463, 1868; Cooley, Const. Lim. 530, 541; Kane *v.* Baltimore, 15 Md. 240, 1859. In proceedings to open streets, the *costs* thereof cannot, unless the right to do so be expressly or plainly given by the statute, be added to the damages and collected from the owners of the adjacent property. The words, "the *expenses* of said improvement," do not embrace the costs of the proceedings. In the absence of authority to collect the same from the adjacent owners, the costs must be borne by the corporation: Morris *v.* Chicago, 11 Ill. 650, 1850; S. P. Trustees *v.* Chicago, 12 *ib.* 403. See Street Case, 10 La. An. 313.

[2] East St. Louis *v.* St. John, *supra.* It would seem to be the opinion of Mr. Justice *Woodbury*, that private property could not be compulsorily taken for such a purpose, if the legislature had undertaken to grant the power. He says: "Who ever heard of laws to condemn private property for public use for a marine hospital or state prison?" West River Bridge Company *v.* Dix, 6 How. (U. S.) 545.

[3] Edgerton *v.* Huff, 26 Ind. 35. See Heyneman *v.* Blake, 19 Cal. 579; Kane *v.* Baltimore, 15 Md. 240,

scribed mode for its exercise strictly followed, is a just one, and should, within all reasonable limits, be inflexibly adhered to and applied.[1]

§ 470. Especially will the courts require a *strict compliance with all conditions precedent* to the exercise of the power, and all provisions as to the manner of its exercise intended for the benefit and protection of the citizen. If the authority be not thus pursued, the proceedings will not have the effect to divest the owner of his property.[2] If defective in respect to jurisdictional requisites, they will be void; if irregular, simply, they will be set aside by the courts on *certiorari* or such other remedy as may be deemed appropriate in the particular state.[3] Not only so, but a municipal corporation claiming title to streets or other public property, by virtue of proceedings under the exercise of the right of eminent domain, must show affirmatively that the requirements of the statute have been complied with. Thus, if under the statute or charter, the *disagreement* of the parties as to the amount of the compensation, is an essential prerequisite of the right of the city compulsorily to appropriate private property, this fact must be shown by the city.[4]

[1] Shaffner *v.* St. Louis, 31 Mo. 264, 1860; Mayor, &c. *v.* Long, *ib.* 369; Harbeck *v.* Toledo, 11 Ohio St. 219, 1860; Dyckman *v.* Mayor, &c. of New York, 1 Seld. 439; State *v.* Jersey City, 1 Dutch. (N. J.) 309, 1855; Cincinnati *v.* Combs, 16 Ohio, 181, 1847; Mitchell *v.* Kirtland, 7 Conn. 229; *Ib.* 350; Nichols *v.* Bridgeport, 23 Conn. 189, 208, 1854; Judson *v.* Bridgeport, 25 Conn. 426; Van Wickle *v.* Railroad Company, 2 Green (N. J.), 162, 1833; Adams *v.* Railroad Company, 10 N. Y. 328; Cooley, Const. Lim. 528, 541; People *v.* Brighton, 20 Mich. 57; Kidder *v.* Peoria, 29 Ill. 77, 1862; Exchange Alley (matter of), 4 La. An. 4; Claiborne Street (matter of), *ib.* 7; Thompson *v.* Schermerhorn, 2 Seld. 92; Burnett *v.* Buffalo, 17 N. Y. 383; Hunt *v.* Utica, 18 N. Y. 442; Kyle *v.* Malin, 8 Ind. 34, 37; Redfield on Railways, Sec. 64; People *v.* Railroad Company, Ill. Sup. Ct. April, 1872. "It is a well established rule, that in matters of expropriation to public use, all the forms of law must be rigidly observed:" Street Case, 16 La. An. 393, 1861.

[2] See authorities last cited.

[3] Harbeck *v.* Toledo, 11 Ohio St. 219; Parks *v.* Boston, 8 Pick. 218; Shaffner *v.* St. Louis, 31 Mo. 264; Baltimore *v.* Eschback, 18 Md. 276; Welker *v.* Potter, 18 Ohio St. 85. *Post*, Chap. XXII.

[4] Dyckman *v.* Mayor, &c. of New York, 1 Seld. 434, 1851, a fully considered case, arising out of the condemnation of the plaintiff's land for the Croton Water Works. If, however, the owner appears, in the proceedings, to assess his damages, and contests the amount, without objecting that no

§ 471. So *notice* of the proceedings to take property for public use is, when required to be given, the basis of jurisdiction or of the right to proceed, and if not given, or if not given in the required manner, the proceedings are unauthorized and void.[1] It is, however, competent for the legislature, in the absence of special constitutional restriction, to provide for constructive notice only to those interested.[2]

effort had been made to agree, the court (it was held) will presume it to have been made: Reitenbaugh *v.* Railroad Company, 21 Pa. St. 100. As to failure to agree with owner, see, also, Railroad Company *v.* Porter, 29 Pa. St. 165; Neal *v.* Railroad Company, 2 Grant (Pa.) Cases, 137; Doughty *v.* Railway Company, 1 Zabr. 442; Gilmer *v.* Lime Point, 19 Cal. 47. Effort and failure to agree held not a condition precedent: Bigelow *v.* Railroad Company, 2 Head, 624. How the fact of the attempt to agree, and its failure, may be shown, *vide* opinions of *Foot* and *Gardiner*, JJ., in Dyckman *v.* Mayor, &c. *supra*. See, also, as to principle in text, Sharp *v.* Spier, 4 Hill, 76; Sharp *v.* Johnson, *ib.* 92; Nichols *v.* Bridgeport, 23 Conn. 189. That owner may waive constitutional or statutory provisions for his benefit — effect of receipt of payment — powers and nature of jurisdiction of Supreme Court as to confirmation (under statute) of reports of commissioners — and that title passes by *force of the statute and payment*, see Embury *v.* Conner, 3 Comst. 511; *Ib.* 197; Arnot *v.* McClure, 4 Denio, 45; Striker *v.* Kelly, 7 Hill, 9; S. C. in error, 2 Denio, 323; Doughty *v.* Hope, 3 Denio, 249; Kennedy *v.* Newman, 1 Sandf. 187.

[1] Harbeck *v.* Toledo, 11 Ohio St. 219, 1860; Kidder *v.* Peoria, 29 Ill. 77, 1862; Baltimore *v.* Bouldin, 23 Md. 328, 1865; McMicken *v.* Cincinnati, 4 Ohio St. 394; Molett *v.* Keenan, 22 Ala. 484; Darlington *v.* Commonwealth, 41 Pa. St. 68; Nichols *v.* Bridgeport, 23 Conn. 189. As to notice and its requisites, see, also, Redfield on Railways, Sec. 72. Waiver of notice: Cruger *v.* Railroad Company, 12 N. Y. 190. As to notice in similar cases: Myrick *v.* La Crosse, 17 Wis. 442: Rathbun *v.* Acker, 18 Barb. 393; Risley *v.* St. Louis, 34 Mo. 404; Welker *v.* Potter, 18 Ohio St. 85; compare Furnell *v.* Cotes, 19 Ohio St. 405; Cowen *v.* West Troy, 43 Barb. 48; State *v.* Hudson, 5 Dutch. (N. J.) 475.

[2] Stewart *v.* Board, &c. 25 Miss. 479; Palmyra *v.* Morton, 25 Mo. 593, 597; Swan *v.* Williams, 2 Mich. 427. The publication of the ordinance which authorizes the opening of the street is frequently the only notice to property owners which is required by the charter or constituent act of the corporation: Curry *v.* Mt. Sterling, 15 Ill. 320, 1853; Joliet *v.* Railroad Company, 23 Ill. 202. Where notice of the proceedings to open streets is required to be given by publication only, and it is thus given, "the law imputes notice, and will not admit testimony to disprove it;" and in such case want of actual notice in any party is no ground for relief, in equity or otherwise, against such proceedings: Methodist Protestant Church *v.* Baltimore, 6 Gill (Md.), 391, 1848. See State *v.* Jersey City, 4 Zabr. 662; Dubuque *v.* Worten, 28 Iowa, 571. *Post*, Chap. XIX.

So where the charter, by a fair construction, provided that *each* applicant for a review of an assessment should himself have the right to select two appraisers, an ordinance denying this right and giving it to a majority of those to be affected by the laying out of a street, is void.[1] So authority to *open* a street and assess the damages on the property benefited, does not give the power to assess for anything more than opening the street and paying for the right of way; it does not include the power to assess other property for the *improvement* of the street by grading, culverting, and the like.[2]

§ 472. So if *damages* are to be assessed by *commissioners who are free-holders*, the fact that they are such should, it has been held, appear on the face of the proceedings.[3] But where the charter required the city council to appoint as commissioners disinterested free-holders residing in the city, and the corporation, in a proceeding *against it* by the land owner for a *mandamus* to compel it to collect the amount awarded, admitted that its council had appointed the commissioners, it was held as against the city that the commissioners would be presumed to possess the requisite qualification, the contrary not appearing on the face of the proceedings.[4]

§ 473. Under the language by which the power to open streets and to take private property for that purpose is usually conferred upon municipal corporations, they may, at any time

[1] Cincinnati *v.* Coombs, 16 Ohio, 181, 1847, and see *ib.* 574.

[2] Reed *v.* Toledo, 18 Ohio, 161, 1849. "Opening" street defined: *Ib.* *Post*, Chapter on Taxation and Local Assessments.

[3] Nichols *v.* Bridgeport, 23 Conn. 189, 208, 1854. If not thus appearing, the proceedings will be held void: *Ib.* See, also, Judson *v.* Bridgeport, 25 Conn. 426; Griffin *v.* Rising, 2 Cush. 75; People *v.* Brighton, 20 Mich. 57.

[4] State *v.* Keokuk, 9 Iowa, 438, 1859. See Higgins *v.* Chicago, 18 Ill. 276; Chicago *v.* Wheeler, 25 Ill. 478. A provision in a charter that plans for opening streets shall be *recorded* in the recorder's office, is directory: Sower *v.* Philadelphia, 35 Pa. St. 231. An order laying out a street or highway may refer to a "plan," in which case the plan meant may be shown and identified by evidence *aliunde*, and used to prove the location and limits of the highway: Stone *v.* Cambridge, 6 Cush. 270, 1850. Sufficiency of description of proposed street: Stewart *v.* Baltimore, 7 Md. 500. As to *mode of procedure*, and various points of practice respecting the assessment of damages, see Redfield on Railways, Sec. 72, where many of the cases are referred to and stated.

before taking possession of the property under completed proceedings, or before the final act of confirmation, recede from or *discontinue the proceedings* they have instituted. This may be done, unless it is otherwise provided by legislative enactment, at any time before vested rights in others have attached. Until the assessments of damages have been made, the amount cannot be known, and it is reasonable that after having ascertained the expense of the project the corporation should have a discretion to go on with it or not, as it sees fit.[1]

[1] Anthony Street, 20 Wend. 618, 619, and prior cases in New York there cited; Martin *v.* Mayor, &c. of Brooklyn, 1 Hill (N. Y.), 541, 1841; *In re* Dover Street, 18 Johns. 506; Millard *v.* Lafayette, 5 La. An. 112, 1850; Roffignac Street (matter of), 4 Rob. (La.) 357; Canal Street (matter of), 11 Wend. 155; McLaughlin *v.* Municipality, 5 La. An. 504; St. Joseph *v.* Hamilton, 43 Mo. 282; State *v.* Hug, 44 Mo. 116; Hullin *v.* Municipality, 4 Rob. (La.) 357; S. C. 11 *ib.* 97, 1845; Water Commissioners of Jersey City, 31 N. J. (2 Vroom) 72, 1864; Clough *v.* Unity, 18 N. H. 75, Pillsbury *v.* Springfield, 16 N. H. 565; Higgins *v.* Chicago, 18 Ill. 276; State *v.* Graves, 19 Md. 351, 1862, where the subject is well discussed by *Bowie*, C. J. After verdict and judgment in favor of the land owner (Hawkins *v.* Rochester, 1 Wend. 54), or after confirmation of the report, private rights attach, and the corporation cannot discontinue the proceedings, although the court may refuse a *mandamus* and leave the parties to their remedy, by action: People *v.* Brooklyn, 1 Wend. 318, and cases cited; *In re* Dover Street, *supra*. A city "may revoke ordinances establishing new streets before they are opened, if, in the exercise of its discretion, it ascertains that the opening of them would be injurious to the public interest; provided, however, that no vested right acquired under the dedication is affected by the change:" *Per Rost*, J., Municipality *v.* Levee Company, 7 La. An. 270, 1852. The author does not understand the case of the State *v.* Keokuk (9 Iowa, 438, 1859), to deny, but rather to affirm, the power of the city to abandon the project of opening a street at any time before the property is taken; but the case holds that the city, *while proceeding* with the work, has no *implied power* to set aside the report of commissioners it had appointed, and to appoint new ones at discretion, "until the damages are brought to square" with its views. On this ground the case is sustainable, and in accordance with settled principles and sound reason. It is not to be taken as holding that the land owner has a vested right to an assessment simply because one has been made. Power to set aside report and appoint new board, see Redfield on Railways, Sec. 72, and notes. Assessment made by commission must be approved or rejected by the court *in toto;* it cannot amend the report: Matter of Claiborne Street, 4 La. An. 7; Matter of Anthony Street, 20 Wend. 618; Simmons *v.* Mumford, 2 Rh. Is. 172; Clarke *v.* Newport, 5 Rh. Is. 333. Where a city has accepted and confirmed the report of commissioners to assess damages, it is concluded from withholding payment because of an alleged error: Higgins *v.* Chicago, 18 Ill. 276; Chicago *v.* Wheeler, 25 Ill. 478.

§ 474. Where proceedings are rightfully discontinued, the land owner cannot have a *mandamus to collect, nor recover by action*, the sum that may have been estimated by commissioners; yet he may have a special action for damages for any wrongful and injurious acts of the corporation in the course of the proceedings.[1] And it has been even held that if the municipality deems it best to abandon the proposed work or project, it may do so, and discontinue proceedings, although it may have taken possession of the premises. By taking such possession, it is argued, the corporation does not impliedly agree to purchase at the appraisement. It may, nevertheless, discontinue the proceedings, and the land owner can only demand the premises, and damages for being deprived of them, and for injuries thereto.[2]

§ 475. Nor has the municipal corporation always been considered as concluded and bound to pay the damages awarded, although the report of the commissioners appointed by it had been confirmed. The act to enable the city of Baltimore to procure a supply of water authorized the city to condemn lands, required the inquisition of damages to be returned to the circuit court, and provided that it "should be confirmed by the said court at its next sitting, if no sufficient cause to the contrary be shown," and the "valuation when paid or tendered shall entitle the city to use the land as fully as if it had been conveyed by the owner." It was held that the city was not bound by the mere inquisition of damages, although *confirmed* by the court, to pay the amount awarded, but could, nevertheless, *abandon* the location in question; that the judgment of confirmation simply decided the value of the land, and

[1] State *v.* Graves, 19 Md. 351, 1862; Millard *v.* Lafayette, 5 La. An. 112, 1850; Roffignac Street, 4 Rob. (La.) 357; Canal Street, 11 Wend. (N. Y.) 155; Anthony Street, 20 Wend. 618; Walling *v.* Mayor, 5 La. An. 660. Where a corporation commences proceedings to open a street, and notifies a proprietor not to continue the making of improvements he had begun, and the corporation *unnecessarily delays* and finally abandons the proceedings, it is, under these circumstances, liable for the actual damages suffered by the proprietor, arising from the suspension of his improvements: McLaughlin *v.* Municipality, 5 La. An. 504, 1850, distinguished from Millard *v.* Lafayette *ib.* 112; Graff *v.* Baltimore, 10 Md. 544, 1857.

[2] Hullen *v.* Municipality, 11 Rob. (La.) 97, 1845.

that payment or tender of the valuation is necessary to give the city a title to the property. It was admitted by the court, however, that if the owner suffered loss or injury by reason of the wrongful acts of the city, he might recover damages therefor.[1] But the language of the act or charter may be such as to give the land owner a right to the sum assessed, and to prevent the corporation from setting aside or discontinuing proceedings, as where it is provided "that after the value and damages shall have been ascertained, the amount, with interest, shall be paid to the person interested on demand."[2]

§ 476. If no *appeal or other special remedy* be given, it has been very generally held that *certiorari lies* against a town or city corporation with respect to their proceedings in laying out, altering, or improving a street, and if invalid they will be set aside by the courts.[3] Adopting what it regarded as the

[1] Graff *v.* Baltimore, 10 Md. 544, 1857, approving Railroad Company *v.* Nesbit, 10 How. (U. S.) 395. See, also, as to private rights vesting, State *v.* Clunet, 19 Md. 351, 1862.

[2] Stafford *v.* Albany, 7 Johns. 541, 1811; S. C. 6 *ib.* 1.

[3] See, *post*, Chap. XXII.; *ante*, Sec. 368. Also, State *v.* Wakely, 2 Nott & McCord, 410, 1820; State *v.* Cockrell, 2 Rich. Law, 6; Parks *v.* Boston, 8 Pick. 218, 1829; Preble *v.* Portland, 45 Maine, 241, 1858; Stone *v.* Boston, 2 Met. 220; Prigden *v.* Bannerman, 8 Jones (N. C.), 53; Baldwin *v.* Bangor, 36 Maine, 518; Gay *v.* Bradstreet, 39 Maine, 580; Dwight *v.* Springfield, 4 Gray, 107, 1855; Kingman *v.* County Commissioners, 6 Cush. 306; French *v.* Commissioners, 12 Mich. 267; Inhabitants of Monterey *v.* County Commissioners, 7 Cush. 394; Intendant *v.* Chandler, 6 Ala. 899, 1844; Ruhlman *v.* Commonwealth, 5 Binn. 26; *Ex parte* Tarlton, 2 Ala. 35, 1841; Swan *v.* Cumberland, 8 Gill. (Md.) 150, 1849; Camden *v.* Mulford, 2 Dutch. (N. J.) 49; Dorchester *v.* Wentworth, 11 Fost. (N. H.) 451; State *v.* Stewart, 5 Strob. (S. C.) Law, 29; State *v.* Swift, 1 Hill (S. C.), 360; Myers *v.* Simms, 4 Iowa, 500; McCrory *v.* Griswold, 7 Iowa, 248; Spray *v.* Thompson, 9 Iowa, 40; Campau *v.* Detroit, 14 Mich. 276, 1866; Duffield *v.* Detroit, 15 Mich. 474.

So in Vermont it is held that the proceedings by the county court to lay out roads are not by the course of the common law, and can only be revised upon *certiorari*, or by writ of *mandamus* in the nature of a *procedendo:* Adams *v.* Newfane, 8 Vt. 271; Lyman *v.* Burlington, 22 *ib.* 131; Woodstock *v.* Gallup, 28 Vt. (2 Wms.) 587, 1856, where *Redfield*, C. J., very fully considers the proper office of writs of *certiorari* and *mandamus* in the nature of a *procedendo*. The latter was deemed the more appropriate remedy where the inferior tribunal disposed of the case upon an incidental question, and not upon the merits: See Rand *v.* Townsend, 26 Vt. 670. It is held in New York (People *v.* Mayor, 2 Hill, 9, 1841,) and Ohio (Dixon *v.* Cincinnati,

well established general doctrine, the Supreme Court of the United States have held that the federal circuit courts, sitting in equity, will not interfere, by injunction, or otherwise, with the proceedings and determinations of the municipal authorities in exercising the power to open streets, unless it becomes necessary, to prevent a multiplicity of suits, or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be proved by extrinsic evidence. There must be some recognized ground of equity jurisdiction, or equity will not interfere. If the proceedings are void, and do not cast a cloud upon the owner's title, he must resort to the ordinary legal remedies. If the municipal authorities have failed to follow the provisions of the charter, or have exceeded the jurisdiction which it confers, the remedy of the land owner for the review and correction of the proceedings is by *certiorari*, and not by bill in equity.[1]

14 Ohio, 240, 1846) that *certiorari* will not lie in such cases unless given by statute, but the cases above referred to will show that the opposite opinion has been very generally adopted: See People *v.* Stilwell, 19 N. Y. 531.

[1] Ewing *v.* St. Louis, 5 Wall. 413, 1866. In this case the city of St. Louis had condemned a portion of the complainant's property for a street, and assessed benefits and damages, and rendered judgment accordingly. The complainant filed a bill in the United States Circuit Court to enjoin the enforcement of the judgment, and also to obtain compensation for the property appropriated for the street. The bill set forth various grounds of alleged illegality in the proceedings, and a demurrer thereto was sustained. "Of these grounds for relief, the principal are," says Mr. Justice *Field*, giving the judgment of the Supreme Court, "that the proceedings were taken without notice to the complainant, or any appearance by him; that the notice provided by law was not published as required; that no provision was made for compensation for the property taken; that no power to render the judgments was vested in the mayor by the legislature or charter, and that the statute under which the proceedings purported to have been taken was repealed before the proceedings were completed. These grounds are, by the demurrer, admitted to be true, and being true, no reason exists upon which to justify the interposition of a court of equity." * * "The second object of the bill,—the obtaining of compensation for the property actually appropriated by the city,—falls with the first. If the proceedings for its appropriation were void, the title remains in the complainant, and he can resort [unless the legislature has required him to pursue a particular remedy] to the ordinary remedies afforded by law for the recovery of the possession of real property wrongfully withheld, or for the redress of trespasses upon it:" 5 Wall. 418, 419. The general subject is further treated in Chap. XXII. *post.*

§ 477. Respecting *compensation*, the mode of ascertaining the amount in case of disagreement, and the time and manner of payment, and the remedies for its enforcement, a few principles applicable to municipal corporations must be noticed. Nearly all the constitutions provide that "just compensation" shall be made for the property taken; and that view is believed to be sound which regards this language as necessarily contemplating compensation of a pecuniary character, in respect to the property appropriated. Some of the constitutions go more into detail, and in terms provide that the compensation shall be made "in money," and some contain a clause as to the time of payment as that it shall be *first made* or *secured*, that is, made or secured before the property is taken

Where the charter of a city, in conferring upon it the power of opening streets, gives to the parties considering themselves aggrieved by the proceedings an *appeal* to a court of competent jurisdiction, with a right to a jury trial, they should seek redress in that tribunal, and not, at least ordinarily, by a bill in equity: Methodist Protestant Church *v.* Baltimore, 6 Gill (Md.), 391, 1848; Dusseau *v.* Municipality, 6 La. An. 575; Stewart *v.* Baltimore, 7 Md. 500, 1855; Baltimore *v.* Clunet, 23 Md. 449, 1865. If an appeal is given, that course is proper for an aggrieved party to pursue; if he has no other remedy, he may have a *certiorari*, but not an injunction, unless on equitable grounds: State *v.* Wakely, 2 Nott & McCord, 410; State *v.* Cockrell, 2 Rich. (S. C.) Law, 6; Spray *v.* Thompson, 9 Iowa, 40; Ewing *v.* St. Louis, *supra*.

A municipal corporation will, on application of the owner, be enjoined from appropriating private property for the purpose of a street, until it complies with the law, by assessing and tendering damages to the owner: Lafayette *v.* Bush, 19 Ind. 326, 1862. Or securing them: Sower *v.* Philadelphia, 35 Pa. St. 231.

When equity will interfere by *injunction* to restrain the illegal and unauthorized acts of municipal corporations: See *post*, Chap. XXII.; Reddall *v.* Bryan (condemnation of property), 14 Md. 444; Richardson *v.* Baltimore, 8 Gill (Md.), 433, 1849; Alexander *v.* Baltimore, 5 Gill (Md.), 383. Opening streets: Attorney General *v.* Peterson, 1 Stockt. (N. J.) 624; Trustees *v.* Davenport, 7 Iowa, 213; Connolly *v.* Griswold, 7 Iowa, 416; *ib.* 248; Harness *v.* Canal Company, 1 Md. Ch. Dec. 248; Walker *v.* Railroad Company, 8 Ohio, 38; Railroad Company *v.* Owings, 15 Md. 199; Henry *v.* Railroad Company, 10 Iowa, 540; Browning *v.* Railroad Company, 3 Green, Ch. (N. J.) 47; Ragatz *v.* Dubuque, 4 Iowa, 349. As to *prohibition* as a remedy against illegal corporate proceedings: State *v.* Wakely, *supra*; Mayo *v.* James, 12 Gratt. (Va.) 17; Warwick *v.* Mayo, 15 *ib.* 528; *Ex parte* Williams, 4 Pike (Ark.), 537 and note, with forms; Arnold *v.* Shields, 5 Dana (Ky.), 18. *Post*, Chap. XXII.

or applied to the proposed public use; and some contain a provision giving the land owner the right to have the compensation determined by a jury. It is not within the scope of this work to follow out these different provisions into the construction which they have received in the courts of the various states, nor to descend to a detailed notice of all the decisions upon special enactments or charters. It must suffice to state the leading principles which the adjudications have established, and to refer to the authorities for a more full illustration and development of the subject. In the outset it is proper to observe that a fundamental consideration in the construction and application of these constitutional provisions is, that they have been found necessary to secure adequate protection to private property, and that they should be vigorously upheld in their full extent and fair meaning. In construing statutes or charters delegating the power of eminent domain, and pointing out the mode of exercising it, it is the duty of the judicial tribunal to insist that every provision intended for the benefit of the owner shall be complied with before he shall be divested of his property. Except so far as the mode of procedure is ordained by the constitution, it is competent for the legislature to prescribe it, and the mode prescribed must, as we have seen, be strictly and guardedly pursued, although unreasonable nicety should not be, and is not, required.[1]

§ 478. If the act or charter authorizing the appropriation of the property itself provides a *specific remedy* to the land owner, by which the amount of his compensation shall be ascertained, that method is usually regarded as exclusive. So long as the municipality keeps within its legislative grant of power, it is not liable to a common law action, nor will it be enjoined; yet if it violates or transcends its authority, the land owner may bring his action of case or trespass, and equity will frequently grant an injunction to restrain an illegal use or appropriation of private property.[2]

[1] Redfield on Railways, Sec. 64, and notes; *ib.* Sec. 72.

[2] See authorities cited, *supra*, Sec. 476, note. This subject is very fully treated in Redfield on Railways, Sec. 8, p. 336 (3d edition). See, also, 1 American Railway Cases, 166–171, note, and cases cited and reviewed; Floyd *v.* Turner, 23 Texas, 293; Cushman *v.* Smith, 34 Maine, 247; Sower *v.* Philadelphia, 35 Pa. St. 231.

§ 479. When a street is *finally established*, the party whose land has been taken *is entitled to payment*, although the street has not been opened.[1] So it is generally held that such a party is entitled to payment when the report of the commissioners of assessment has been finally acted on and confirmed, or when, before confirmation, the municipal authorities have taken and retain actual use of his property.[2] When the owner's right to damages is vested or complete, he may, in proper cases, sue the municipality therefor, or have a *mandamus* to compel it to pay or to proceed to collect the assessments which constitute the fund from which payment must come.[3]

§ 480. In the absence of controlling constitutional provisions, it is competent for the state to authorize municipal corporations to take private property for public use *without first making payment;* but it is not usual for the legislature to confer this power, and, even if it does, it is still necessary, by some enactment, that it shall make certain and adequate provision by which the owner can coerce compensation, through the judicial tribunals or otherwise, without unreasonable delay.[4]

[1] Shaw *v.* Charlestown, 3 Allen, 538; Philadelphia *v.* Dickson, 38 Pa. St. 247; Griggs *v.* Foote, 4 Allen, 195. The constitutional provision against taking private property until compensation be made, means *taking* the property from the owner and *actually* applying it to the use of the public. A survey and other preliminary steps are not a *taking*, within the meaning of the constitution. But until the compensation the owner is entitled to has been made or tendered as required by law, a street cannot be opened or used, and an entry to grade or prepare the ground for a street would be illegal and a trespass: Stewart *v.* Baltimore, 7 Md. 500, 1855. That preliminary surveys may be authorized by the legislature without making compensation therefor, and that, when so authorized, are not trespasses: See authorities cited in Redfied on Railways, Sec. 66.

[2] *Ante*, Secs. 474, 475. See Johnson *v.* Almeda, 14 Cal. 106.

[3] Mayor, &c. *v.* Richardson, 1 Stew. & Port. (Ala.) 12, 1831; Shaw *v.* Charlestown, 3 Allen (Mass.), 538; Philadelphia *v.* Dyer, 41 Pa. St. 463; Philadelphia *v.* Dickson, 38 *ib.* 247; State *v.* Hug, 44 Mo. 116; State *v.* Keokuk (*mandamus* to collect assessment), 9 Iowa, 438; Rexford *v.* Knight, 11 N. Y. (1 Kern.) 308; Higgins *v.* Chicago, 18 Ill. 276; Rome *v.* Jenkins (action for value), 30 Geo. 154, 1860. A city is not primarily liable for benefits assessed against individuals: Shaffner *v.* St. Louis, 31 Mo. 264.

[4] People *v.* Hayden, 6 Hill (N. Y.), 359; Rexford *v.* Knight, 11 N. Y. 308; Cooley, Const. Lim. 560; Curran *v.* Shattuck, 24 Cal. 427; McCann *v.* Coun-

Either by constitutional provision or legislative enactment, the almost invariable, and certainly the just, course, is to require payment to precede or to accompany the act of appropriation.[1]

§ 481. In the absence of special constitutional restrictions upon the power of the legislature, it may be regarded as settled by repeated adjudications in different states, that authority may be conferred by the legislature upon municipal corporations to open streets, and *to apportion the damages* awarded or found due to those whose lands are taken *among the lots benefited* by the improvement, and to make the amount thus apportioned or assessed a lien thereon. The legislature may, in its discretion, authorize the whole expense to be assessed upon the lots fronting on the street to be opened or improved, thus treating the adjacent property as exclusively benefited, or it may authorize the assessment to be made upon other property in addition, or it may provide for the payment of damages, in whole or in

ty, 7 Cal. 121. Authority to towns and cities to open streets, and to take private property for public use, without *first* making compensation therefor, has frequently been held legal in the absence of special constitutional provisions requiring payment before possession or use be enjoyed: Dronberger *v.* Reed, 11 Ind. 420, 1858; McCormick *v.* Lafayette, 1 Ind. (Cart.) 48, 1848; Bloodgood *v.* Railroad Co. 18 Wend. 1; Beekman *v.* Railroad Co. 3 Paige, Ch. R. 45; Commissioners *v.* Bowie, 34 Ala. 461. Lafayette *v.* Bush, 19 Ind. 326. If a mode of obtaining compensation is specifically provided for, compensation, it has been held, must be sought in that way, and not by action, and in that in such case, the doctrine of cumulative remedies is not applicable: Kimble *v.* Canal Company, 1 Ind. (Cart.) 285, 1848; Colking *v.* Baldwin, 4 Wend. 667; Railroad Company *v.* Smith, 6 Ind. 249; Railroad Company *v.* Connelly, 7 Ind. 32; Railway Company *v.* Oakes, 20 Ind. 9, 1863; Mitchell *v.* Turnpike Company, 3 Humph. 456; Brown *v.* Beatty, 34 Miss. 227; Dodge *v.* Commissioners, 3 Met. 380.

[1] 2 Kent Com. 339, note; Redfield on Railways, 147; Colton *v.* Rossi, 9 Cal. 595, 1858; McCann *v.* County, 7 Cal. 121. An injunction was granted to restrain a municipal corporation with very limited powers of taxation from opening a street until adequate security for compensation be given: Keene *v.* Bristol, 26 Pa. St. 46. Under a statute of Pennsylvania, land taken for corporate purposes vests in the corporation in fee on payment, and the corporation is not bound to see to the application of the purchase money: Crangle *v.* Harrisburg, 1 Barr (Pa.), 132. When payment of damages is required within a limited time, or proceedings become void, see Commonwealth *v.* County Commissioners, 2 Whart. (Pa.) 286.

part, from the general treasury.[1] The *compulsory acquisition of property* for streets, or other public purposes, and the payment

[1] People *v.* Mayor, &c. of Brooklyn, 4 N. Y. (4 Comst.) 419, 1851, the leading case upon the subject. Approved, Commonwealth *v.* Woods, 44 Pa. St. 113; Stroud *v.* Philadelphia, 61 Pa. St. 255; Scovill *v.* Cleaveland, 1 Ohio St. 126, 135; Alexander *v.* Baltimore, 5 Gill (Md.), 1847; Moale *v.* Baltimore, 5 Md. 314, 1854; expressly approving, People *v.* Mayor, &c. of Brooklyn, *supra;* McMasters *v.* Commonwealth, 3 Watts, 292, 1834; Livingston *v.* Mayor, 8 Wend. 85; Schenley *v.* Allegheny, 25 Pa. St. 128, 1854; Betts *v* Williamsburg, 18 *ib.* 26; Lexington *v.* McQuillian's Heirs, 9 Dana (Ky.), 513, 1853; Williams *v.* Cammack, 27 Miss. 209, 224, 1854; Nichols *v.* Bridgeport, 23 Conn. 189, 207. See, also, McGehee *v.* Mathis (levee tax), 21 Ark. 40, 1860; Argenti *v.* San Francisco, 16 Cal. 255; Emery *v.* Gas Company, 28 Cal. 345; Howard *v.* Church, 18 Md. 451; Peoria *v.* Kidder, 26 Ill. 351; State *v.* Portage, 12 Wis. 562; Holmes *v.* Jersey City, 1 Beasl. (N. J.) 264; Cuming *v.* Mayor, &c. of Brooklyn, 11 Paige, 596; White *v.* Mayor, &c. 2 Swan (Tenn.) 364, 1852; Palmyra *v.* Morton, 25 Mo. 593, 1857; Egyptian Levee Company, 27 Mo. 495; Lockwood *v.* St. Louis, 24 Mo. 20, 1851; Smith *v.* Aberdeen, 25 Miss. 458, 1853; Municipality *v.* Dunn, 10 La. An. 57; Cruikshank *v.* City Council, 1 McCord (South Car.), 360, 1821; Williams *v.* Detroit, 2 Mich. 560; Cone *v.* Hartford, 28 Conn. 363, 374; Wallace *v.* Shelton, 14 La. An. 498; Clapp *v.* Hartford, 35 Conn. 66; Dorgan *v.* Boston, 13 Allen (Mass.), 223. *Post,* Chap. XIX. on Taxation. Under a constitutional provision giving the power of taxation by assessment, and another which guarantees to owners of land taken for public use full compensation, "without *deduction,* for benefits," an *assessment* may be made upon lands fronting on a new street laid out through it, to reimburse the amount of compensation paid the owner for the land taken for the street: Cleveland *v.* Vick, 18 Ohio St. 303, 1868. See Chicago *v.* Larned, 34 Ill. 203, 1864, criticising The People *v.* Mayor, &c. of Brooklyn, *supra,* and the decisions in other states which follow it, and holding them inapplicable in that state under its constitution. S. P. Ottawa *v.* Spencer, 40 Ill. 211; S. C. 36 Ill. 211. In the case of The State *v.* Charleston, 12 Rich. (South Car.) Law, 702, 1860, the power of the legislature of that state to authorize local assessments to pay for local improvements was very fully considered by the Court of Errors. A portion of a street was widened by taking a strip of land off the lots on one side and adding it to the street, and the expense, pursuant to an act of the legislature, was ordered to be assessed upon the proprietors of houses and lots on both sides of the street. The lot owners on the opposite side of the street, whose lands were not taken for the street, but who were assessed to pay the expense, contested the constitutionality of the statute authorizing this to be done. The Court of Errors held the act to be unconstitutional. No reference is made to the decisions in other states, and although the constitutions of New York and South Carolina are not literally alike, the reasoning of the court is not reconcilable with that in the case of People *v.* Mayor, &c. of Brooklyn. Still that case has been very generally followed and its reasoning approved as sound, as will be seen on an examination of the cases above cited.

therefor in any of the above modes, involve the exercise of two different and high prerogative or sovereign powers, namely, that of the *eminent domain*, so called, by which the property is taken, and that of *taxation* (which includes assessments upon the property benefited or legislatively supposed to be benefited), by which compensation is made to those whose property has been thus appropriated. We have already pointed out the usual constitutional limitations upon the power of eminent domain. What limitations exist upon the power of taxation must be found in the nature of the power itself, and in express or implied restrictions in the organic law; otherwise, the power is supreme, transcendent, and without theoretical limits. The subject of taxation and of assessments for local improvements, and the limitations upon the power, will be hereafter considered, and need not, therefore, be referred to in detail in this place.[1] An assessment against abutters for benefits received from the opening of a street does not contravene the provision of the constitution, "that all property subject to taxation shall be taxed in proportion to its value."[2] Nor is an assessment upon lands fronting on a street, to reimburse the amount paid the owner for land taken from him for a street in violation of the provision of the constitution, which declares the compensation to be paid to a party for his land taken for public use, shall be "without *deduction* for benefits."[3]

§ 482. The *tribunal* by which the amount of compensation to the land owner is to be determined must be prescribed by positive law. Some of the state constitutions, in terms, require that the compensation shall be assessed by a *jury*, which presumptively means such a body as under the constitution and laws of the particular state makes a lawful jury. Commissioners appointed *ex parte*, and without opportunity of challenge, are not a jury. Where the right to an assessment by a jury is

[1] See chapter on Taxation and Local Assessments, *post.*

[2] Garrett *v.* St. Louis, 25 Mo. 505, 1857. So, under a constitution which requires that all taxation shall be equal and uniform *throughout the state:* Draining Company Case, 11 La. An. 338. See chapter on Taxation and Local Assessments, *post.*

[3] Cleveland *v.* Wick, 18 Ohio St. 303. Assessment for benefits is not the same as deduction for benefits: *Ib.*

specifically secured by constitutional provision, this is a right of which the property owner cannot be deprived by any act of the legislature, nor by its failure to provide for an assessment in this manner. He may waive the right, but he cannot be deprived of it without his consent. Although the right to an assessment by a jury of twelve men be given by the constitution, the assessment may, under legislative authority, be made in the first instance by commissioners, if, by appeal or other transfer, to a common law court, an unfettered right to an assessment by a jury under judicial direction exists or is provided.[1]

[1] Lamb *v.* Lane, 4 Ohio St. 167, 1854. The able opinion of *Thurman*, C. J., and its reasoning, must command general assent. The constitution of *Ohio* (Article 1, Sec. 19) provides, that "Where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be *assessed by a jury* without deduction for the benefits to any property of the owner." The court held that the word "jury," as thus used, means a tribunal of twelve men presided over by a court, and hearing the allegations, evidence, and arguments of the parties, yet they may be sent to view the premises. The court also held, that an assessment might be made in the first instance by viewers, if the right of appeal be given to a court in which the damages may be assessed by a *constitutional jury:* S. P. Shaver *v.* Starrett, 4 Ohio St. 494; Wills *v.* County Road, 7 Ohio St. 16. Construction of similar provision of constitution of *Iowa* (Art. 1, Sec. 18), see Des Moines *v.* Layman, 21 Iowa, 153, 1866, in which it was not denied that the constitution gave the right to have the amount determined by a *jury*, but it was held by the majority of the court that the party, by adopting the special mode of review pursued by him in that case, was not entitled, as of right, to an assessment by a jury.

Section 7 of Article 1, of the constitution of 1846 of *New York*, provided that "When private property shall be taken for any public use, the compensation to be made therefor shall be ascertained by a *jury* or by not less than three commissioners appointed by a court of record as shall be prescribed by law." It was held, in view of a long legislative usage in respect to the subject of assessing damages and the mode, that the term "jury," as used in the constitution, did not necessarily import a tribunal consisting of twelve men, acting only upon a unanimous determination, but, on the contrary, was used to describe a body of jurors of different numbers, and deciding by majorities or otherwise, as the legislature in each instance directed. But in the absence of such usage, *Johnson*, J., who delivered the opinion of the court, said that without a shadow of doubt resting on his mind, he should be of opinion that the term "jury" "imports a jury of twelve men, whose verdict is to be unanimous. Such," he continues, "must be its acceptation to every one acquainted with the history

§ 483. The determination of the question, What is the *value of property* taken, or what is the *amount of damage* sustained by the taking, is undeniably judicial in its nature, and peculiarly adapted for decision by a jury under the direction of the court. Yet it has been held that the ordinary provision

of the common law, and aware of the high estimation in which that institution, so constituted, has for so long a period been held:" Cruger *v.* Railroad Company, 12 N. Y. (2 Kern.) 190, 1854; Brooklyn *v.* Patchen, 8 Wend. 47, 1831; Campau *v.* Detroit, 14 Mich. 276, 1866; May *v.* Railroad Company, 3 Wis. 219. Under the new constitution of *Illinois*, the land owner has a right to a jury to assess his damages if he demands it: The People *v.* The Judge, &c. Ill. Supreme Court, April, 1872.

That a special constitutional provision, giving the right to an assessment of damages by a *jury*, presumptively means more than a mere commission, however numerous, and means a tribunal under judicial supervision and control, is made more apparent when the occasion of adopting such a provision is considered. This aspect of the subject is referred to by one of the judges in Des Moines *v.* Layman, 21 Iowa, 158, who says: "The taking of private property, without the consent of the owner, is the exercise of one of the highest powers of government. It has been much abused by the great powers which have been conferred upon municipal corporations, allowing them to judge of the necessity, and their citizens to act by a commission from the city council or some subordinate magistrate or court, as a jury or body to fix the amount of compensation. To prevent such abuses, and to give proper security and safeguards to the property owner, it was very wisely provided in the new constitution of the state, that private property should not be taken for public use until '*the damages shall be assessed by a jury:*' Bill of Rights, Sec. 18. 'The right of trial by jury shall remain inviolate, but the general assembly may authorize a trial by a jury of a less number than twelve in the inferior courts:' *Ib.* Sec. 9. By these provisions, the right to an assessment of his damages by a *jury* is secured by the constitution to the defendant. No assessment of them has been made by a jury unless the three men appointed by the county court are to be regarded as a jury. I do not so regard them."

The constitution of *Maryland* provides "that no private property shall be taken for public use without just compensation, as agreed upon between the parties *or awarded by a jury*, being first paid or tendered to the party entitled to such compensation." Under this the legislature may pass a law authorizing commissioners to assess the value of the property if the law secures to the owner the right of a jury trial, *upon an appeal*, to be taken in a specified reasonable time; neglect or refusal to appeal being regarded as a waiver of the right to have the damages awarded by a jury: Stewart *v.* Baltimore, 7 Md. 500, 1855. See, also, State *v.* Graves, 19 Md. 351; Lumsden *v.* Milwaukee, 8 Wis. 485; Alexander *v.* Baltimore, 5 Gill, 383; M. E. Church *v.* Baltimore, 6 *ib.* 391; Morford *v.* Barnes, 8 Yerg. 444; Beers *v.* Beers, 4 Conn. 535; McDonald *v.* Schell, 6 Serg. & Rawle, 240; Sharpless *v.* West Chester, 1 Grant Cas. (Pa.) 257.

as to the right of trial by jury in civil cases has no relation to original assessments in such cases; and that in the absence of special provision in the organic law, giving the right to have a jury assess the damages, it is competent for the legislature to provide for assessments by any other just mode, and to conclude the owner as to the amount without giving him the right to be heard before a jury.[1]

§ 484. By the constitution of New York it is provided that the compensation "shall be ascertained *by a jury, or by* not less than *three commissioners* appointed by a court of record." This language in respect to commissioners was considered by the Court of Appeals to imply that the commissioners were to be selected by the court, and assumes that in such selection the court will exercise judgment in making fit appointments, and it was held that a selection of appraisers by lot, and an appointment thereon by a court of record, would not be in compliance with the constitutional provision.[2] It was also decided, that under this provision it is not competent for the legislature

[1] Livingston *v.* Mayor, &c. 8 Wend. 85, 1831; Beekman *v.* Railroad Company, 3 Paige, 75; Petition of Mt. Washington County, 35 N. H. 134; State *v.* Jersey City, 2 Dutch. 444; Sedgw. Stat. and Const. Law, 529; Cooley, Const. Lim. 563; Railroad Company *v.* Heath, 9 Ind. 558; Hymes *v.* Aydelott, 26 Ind. 431; Heyneman *v.* Blake, 19 Cal. 579; Koppikus *v.* Commissioners, 16 Cal. 248; Dalton *v.* Northampton, 19 N. H. 362. As to right of *trial by jury when an appeal* is authorized to a court of record: Railroad Company *v.* Miller, 30 Ind. 209; Railroad Company *v.* Heath, 9 Ind. 558; Connelly *v.* Griswold, 7 Iowa, 416; Ragatz *v.* Dubuque, 4 Iowa, 343; People *v.* The Judge, &c. Ill. Supreme Court, April, 1872.

The constitution of *Wisconsin* contained a provision (Art. 11, Sec. 2) requiring "the necessity" for the appropriation of private property to "be first established by the verdict of a jury." In the charter of Milwaukee it was enacted that a jury of six freeholders should be appointed by the council to decide upon the necessity of taking land for streets, and the amount of compensation, and this provision of the charter was held to contravene the constitution, since the jury so called were not required by the charter to be sworn, and since the charter gave the council power to confirm the report of the jury, and declared that such confirmation should be conclusive: Lumsden *v.* Milwaukee, 8 Wis. 485. There is a similar provision in the constitution of 1851, of *Michigan*: People *v.* Kimball, 4 Mich. 95; Campau *v.* Detroit, 14 Mich. 276.

[2] Cruger *v.* Railroad Company, 12 N. Y. (2 Kern.) 190, 1854.

to authorize the common council of a city to appoint appraisers to ascertain the compensation to owners for property taken under the power of eminent domain.[1]

§ 485. The charter of a city gave it power to take private property for streets, with a proviso that damages should be assessed, by a jury, to those prejudiced. A jury acted and assessed damages to a property owner. It was held, that a subsequent resolution of the council, reciting "that upon full examination the jury could not have had a correct view of the case before them," and appropriating a larger sum as damages, was binding upon the corporation, the court being of opinion that the corporation had the right to contract or stipulate with the land owner as to damages without the intervention of a jury, and that this included the right to disregard their finding, and proceed to make a settlement as if they had never been summoned.[2]

§ 486. Concerning the *amount of damages*, or the principles upon which compensation to the owner whose property is taken should be measured, there are no fixed rules embracing the whole subject universally applicable throughout the different states. In some of the states provision is made in their organic law, that the compensation shall be in money, and without deduction for benefits. Similar provisions are sometimes made in the charter or statute authorizing the appropriation, and which exert a modifying influence on the rules of law, as previously held in the same state or elsewhere. In determining the *quantum* of damages, regard must always be had to any special, constitutional, or statutory provisions relating to the subject, and the previous course of decision in which those provisions have not unfrequently originated. In states where the subject is not expressly regulated by positive law, the books abound in cases which cannot be reconciled respecting

[1] Clark *v.* Utica, 18 Barb. 451.

[2] Mayor, &c. *v.* Richardson, 1 Stew. & Port. (Ala.) 12, 1831. This case further holds, that on the consent of the land owner to the resolution, he could maintain an action for the recovery of the amount, and that the resolution was an admission, *prima facie* binding on the corporation, of the right of the owner to the land appropriated: *Ib.*

what is and is not proper to be taken into consideration in the way of benefits on the one hand, and of injuries on the other, to the proprietor, whose property is taken for some public work or improvement. The ultimate inquiry is not a complex one—it is simply, What is the damage which the owner will sustain in consequence of the proposed appropriation of his property? But the elements which enter into this inquiry, when the matter is left at large to the courts without legislative rule, are far from being easy of apprehension or application. Cases, however, in which the appropriation is by municipal agencies for streets, are not apt to present as many difficulties as are met with when the appropriation is for railway or other like purposes.

§ 487. The author must content himself with a statement of those rules or principles which he believes to be the best supported by reason, and which are sufficient to embrace the cases which ordinarily arise in connection with the exercise of the right of eminent domain by municipalities, whose chief occasion for the power is to open and establish streets and ways. The rules laid down are, of course, subject to modification by any special constitutional provision or legislative enactment varying them. 1. If the proposed improvement takes *all* of the land of the owner, the case, as to the amount of compensation, is comparatively easy of solution. He is entitled to the fair and full market or pecuniary value of the property at the time it is appropriated, but to no more. This statement of the rule excludes from consideration all such elements as that the owner does not desire to sell, or that the property is endeared to him by association, and the like.[1] But it includes, and justly so, the full value at *the time* it is taken, no matter what may have caused that value, and although it may have shared, with other property, in the benefits of the proposed improvement. The transaction is a compulsory purchase, the compulsion, however, coming from the public, and the amount to which the owner is entitled is not simply the value of the property at forced sale, but such sum as the property is worth

[1] Furman Street, 17 Wend. 650; William and Anthony Streets, 19 Wend. 678.

in the market, if persons desiring to purchase were found who were willing to pay its just and full value, but no more.[1]

2. If, however, as most commonly happens, *part* only of the property is to be taken, more embarrassing questions are apt to arise, in determining which regard must be had to the condition as to shape, use, and convenience, in which the residue of the property will be left, and how its value will be affected by that which is taken for the proposed improvement. And here, most usually, arises the difficult inquiry, What benefits and what injuries are proper to be regarded as affecting the question of damages? Now benefits and injuries are of two kinds: I. General or public, being such as are not peculiar to the particular proprietor, part of whose property is taken, but those benefits in which he shares, and those injuries which he sustains, in common with the community or locality at large. II. Special or local, being those peculiar to the particular land owner, part of whose property is appropriated, and which are not common to the community or locality at large, such, on the one hand, as rendering his adjoining lands more useful and convenient to him, or otherwise giving them a peculiar increase in value, and, on the other, rendering them less useful or convenient, or otherwise, in a peculiar way, diminishing their value. The former class of benefits or injuries — namely, those which are general, and not special — have, according to the almost uniform course of decision, no place in the inquiry of damages, and cannot be considered for the purpose of reducing the amount, being too indirect and contingent. But injuries which specially affect the proprietor, or benefits which are specially conferred upon his adjacent property, part of which is taken, are to be considered, unless, by the constitution of the state or legislative enactment, *all* benefits, special as well as general, are to be excluded.[2]

[1] Railroad Company *v.* Doughty, 2 Zabr. 495, 1850; Cooley, Const. Lim. 565; Giesy *v.* Railroad Company, 4 Ohio St. 308, 1854.

[2] Meacham *v.* Railroad Company, 4 Cush. 291, 1849; Dickenson *v.* Fitchburg, 13 Gray, 546; Upton *v.* Railroad Company, 8 Cush. 600, 1851; Robbins *v.* Railroad Company, 6 Wis. 636; Farwell *v.* Cambridge, 11 Gray, 413; Dwight *v.* Commissioners, 11 Cush. 201; Howard *v.* Providence, 6 Rh. Is. 514. A learned jurist, and experienced and able judge, thus expresses his views on this subject: "When only a portion of a parcel of land is appro-

§ 488. Applying these principles, *a proper and practical rule* would be to first ascertain the fair market value of the entire premises, part of which is proposed to be taken, *not* necessarily irrespective of such improvement, but irrespective of the causes which have contributed to that value, then ascertain the like value of the premises in the condition in which they will be after the part is taken, without deduction for any general benefit which will result from the proposed improvement, but unless specially excluded by positive law, deducting special benefits as above defined, and the difference in value, be it more or less than the value of the part taken, will constitute the measure of compensation.[1] Even without an express provision

priated, just compensation may, perhaps, depend upon the effect which the appropriation may have on the owner's interest in the remainder to increase or diminish its value, in consequence of the use to which that taken is to be devoted, or in consequence of the condition in which it may leave the remainder in respect to convenience of use. If, for instance, a public way is laid out through a tract of land which before was not accessible, and if, in consequence, it is given a front, or two fronts, upon the street, which furnish valuable and marketable sites for building lots, it may be that the value of that which remains is made, in consequence of taking a part, vastly greater than the whole was before, and that the owner is benefited instead of damnified by the appropriation. Indeed, the great majority of streets in cities and villages are dedicated to the public by the owners of lands, without any other compensation, or expectation of compensation, than the increase in market value which is expected to be given to such lands thereby; and this is very often the case with land for other public improvements which are supposed to be of peculiar value to the locality in which they are made. But where, on the other hand, a railroad is laid out across a man's premises, running between his house and his outbuildings, necessitating, perhaps, the removal of some of them, or upon such a grade as to render deep cuttings or high embankments necessary, and thereby greatly increasing the inconveniences attending the management and use of the land, as well as the risks of accidental injuries, it will often happen that the pecuniary loss which he would suffer by the appropriation of the right of way would greatly exceed the value of the land taken, and to pay him that value only would be to make very inadequate compensation:" Cooley, Const. Lim. 565.

[1] See Sater *v.* Plank Road Company, 1 Iowa, 393, decided under the constitution of 1846. The rule, as there laid down, does not fully accord with that stated in the text, since it requires the marketable value of the premises proposed to be taken to be ascertained irrespective of the proposed improvement, and does not distinguish between general and special benefits. By the *Iowa* constitution of 1857, *benefits are excluded:* Deaton *v.* Polk

of law requiring tthat here shall be no reduction for benefits, it seems to the author unjust to require that the value of the land shall be ascertained irrespective of those *general* benefits which are common to all land in the vicinity, and which arise out of the proposed improvement. And the rule held by some courts, that these benefits shall be excluded in ascertaining the value of the whole land in the first instance, and then allowing to be deducted from this sum the value of the remaining portion

County, 9 Iowa, 594; Israel *v.* Jewett, 29 Iowa, 475; *Pennsylvania rule* is similar to the one in Sater *v.* Plank Road Company, *supra;* Watson *v.* Railroad Company, 37 Pa. St. 469; Pennsylvania Railroad *v.* Heister, 8 Pa. St. 445; Hornstein *v.* Railroad, 51 Pa. St. 87. *As to general and special benefits:* Railroad Company *v.* Collett, 6 Ohio St. 182, 1856; Railroad Company *v.* Ball, 5 Ohio St. 568; State *v.* Digby, 5 Blackf. 543; Robbins *v.* Railroad Company, 6 Wis. 636; Hornstein *v.* Railroad Company, 51 Pa. St. 87; Woodfolk *v.* Railroad Company, 2 Swan, 422; McIntire *v.* State, 5 Blackf. 384; Railroad Company *v.* Hunter, 8 Ind. 74; Vanblaricum *v.* State, 7 Blackf. 209; McMahon *v.* Railroad Company, 5 Ind. 413; Isom *v.* Railroad Company, 36 Miss. 300; Pacific Railroad *v.* Chrystal, 25 Mo. 544; Newby *v.* Platte County, 25 Mo. 258; Sutton *v.* Louisville, 5 Dana, 28; Jacob *v.* Louisville, 9 Dana, 114; Arnold *v.* Bridge Company, 1 Duvall (Ky.), 372; Robinson *v.* Robinson, *ib.* 162. In *Mississippi, even incidental benefits* cannot be set off against incidental damages: Railroad Company *v.* Moye, 39 Miss. 374, 1860. In *Georgia, benefits are excluded:* Savannah *v.* Hartridge, 37 Geo. 113, 1867.

The opinion of *Ranney*, J., in Giesy *v.* Railroad Company, 4 Ohio St. 308, 1854, contains an able exposition of the *principles on which damages should be assessed* under the constitution of *Ohio*, which contains a provision that the "compensation shall be assessed by a jury, without deduction, for benefits to any property of the owner." In the course of his opinion he says: "Whether property is appropriated directly by the public or through the intervention of a corporation, the owner is entitled to receive its fair market value at the time it is taken—as much as he might fairly expect to be able to sell it to others for, if it was not taken—and this amount is not to be increased from the necessity of the public or the corporation to have it, on the one hand, nor diminished from any necessity of the owner to dispose of it on the other. It is to be valued precisely as it would be appraised for sale upon execution, or by an executor or guardian, and without any regard to the external causes that may have contributed to make up its present value. The jury are not required to consider how much, nor permitted to make any use of the fact that it may have been increased in value by the proposal or construction of the work for which it is taken. To allow this to be done would not only be unjust, but would effect a partial revival of the very abuse which it was a leading purpose of these constitutional provisions to correct. It would be unjust, because it establishes for a corporation what is done for no one else, a sort of right in the property

after the improvement is made, is still more indefensible, and it was the general conviction of the injustice of such a rule that has led to so many constitutional provisions and legislative enactments prohibiting the land owner from being charged with benefits. But for benefits, direct and special to him, he should be charged in making up the estimate of the amount to which he is justly entitled, unless, by the constitution or statute, even such benefits are not to be considered.

of others to the reflected benefits of its improvement, itself submitting to no reciprocity by affording others a compensation for the effect of their improvements upon the property of the corporation. And it is doubly unjust where, as must very often happen, the increase in value accrued to the benefit of a former owner, and has been bought and paid for by the present holder, from whom the property is taken at a diminished price." So, in the Railroad Company *v.* Doughty, 2 Zabr. 495, 1850, the Supreme Court of *New Jersey* expresses its opinion to be, that in estimating the value of land taken for the purpose of a public improvement the present value of the lands, not at a forced sale, but at a sale which a prudent holder would make if he had the power to choose his own time and terms, is to be given.

In the case of Paul *v.* Newark, at the Essex (N. J.) Supreme Court circuit, *Depue*, J., held, that a *house wholly within the lines of the proposed street* must (if the owner so wishes) be taken and paid for in full by the city, and the city cannot compel him to move it by merely paying costs of removal and restoration, even although the owner has immediately adjacent land, sufficient to accommodate the house. When statutes provide for taking "lands," the word is used in its broad signification, and includes all things affixed to lands. In Meyer *v.* Newark, where only a part (about one-half) of a house was within the lines of the proposed street, the question was left for review before the court *in banc*, whether the city was compelled to take the whole, or merely to pay for the damages incident to the destruction of the half of the house; the court, however, strongly intimated, that in cases where the house was not entirely destroyed, it was only necessary to pay damages sufficient to compensate the owner, and the whole need not be taken or paid for: *Ib.* 6 Am. Law Review, 576, from which the above is extracted.

CHAPTER XVII.

Dedication.

§ 489. This chapter will treat of the doctrine of the dedication of property to public uses, so far as relates to municipalities, under the following arrangement:—

1. Importance of the Doctrine of Dedication—Sec. 490.
2. Statutory and Common Law Dedications—Secs. 491, 492.
3. Common Law Dedication—*Rationale* and Requisites—Secs. 493–495.
4. Extent of Dedication as Respects the Donor—Secs. 496, 497.
5. Who May Dedicate—Intent—How Established—Secs. 498, 499.
6. Effect of Long User and Acquiescence—Secs. 500–502.
7. Effect of Platting and Sale of Lots—Secs. 503, 504.
8. Acceptance by the Public—When and for What Purpose Necessary—Sec. 505.
9. Dedication of Public Squares and Their Uses—Secs. 506–509.
10. Dedications for Other Purposes—Secs. 510, 511.
11. Alienation and Change of Use—Secs. 512–514.
12. Reverter—Misuser—Remedy—Sec. 515.

Importance of the Doctrine of Dedication.

§ 490. That *property may be dedicated to public use* is a well established principle of the common law. It is founded in public convenience, and has been sanctioned by the experience of ages. Indeed, without such a principle, it would be difficult, if not impracticable, for society, in a state of advanced civilization, to enjoy those advantages which belong to its condition, and which are essential to its accommodation. The

importance of this principle may not always be appreciated, but we are in a great degree dependent on it for our highways and streets, and the grounds appropriated as places of amusement or of public business which are found in all our towns, and especially in our populous cities.[1]

Statutory and Common Law Dedications.

§ 491. Dedications of land to public uses are divisible into two classes: 1. *Statutory Dedications.* 2. *Common Law Dedications.* Statutory dedications are made, and it has been decided can be made, only by pursuing substantially the course prescribed by the particular statute. Thus, if the statute requires that the map or plat describing the streets, alleys commons, or other public grounds, shall be *acknowledged* before it is recorded, an acknowledgment is essential to a valid and effective dedication under the *statute.*[2] The *effect* of a dedication

[1] *Per McLean*, J., in New Orleans *v.* United States, 10 Pet. 662, 712, 1836. Dedication is "the act of devoting or giving property for some proper object, and in such a manner as to conclude the owner:" *Beardsley*, J.; Hunter *v.* Sandy Hill, 6 Hill (N. Y.), 407, 411, 1844. See Dovaston *v.* Payne, 2 Smith Lead Cas. 90, and notes, for a general view of the law of dedication. There is an excellent view of the subject in Angell on Highways, Chap. III. See, also, chapter on Eminent Domain, *ante*, and chapter on Streets, *post.*

[2] Wisby *v.* Boute, 19 Ohio St. 238; Fulton *v.* Mehrenfeld, 8 Ohio St, 440, 1858; questioning the *grounds* of prior decision of Morris *v.* Bowers, Wright, (Ohio), 750; Williams *v.* The Church, 1 Ohio St. 478; Winona *v.* Huff, 11 Minn. 119, 1866; Baker *v.* St. Paul, 8 Minn. 491, 1863; Schurmeier *v.* Railroad Company, 10 Minn. 82, 1865; affirmed in Supreme Court, 7 Wall. 272, 1868; State *v.* Hill, 10 Ind. 219, 1858; Hays *v.* State, 8 *ib.* 425; Noyes *v.* Ward, 19 Conn. 250, 1848; Des Moines *v.* Hall, 24 Iowa, 234, 1868. See Ragan *v.* McCoy (requisites of acknowledgment), 29 Mo. 356, 1860. If the plat as recorded, pursuant to a statute requiring it, contains enough to show that it was intended by the owner to be a dedication under the statute, it would seem, to the author, to be right, notwithstanding a defective acknowledgment, or the like, to hold the proprietor estopped to make the objection that he did not comply with the statute.

Authentication of town plats and maps, nature of evidence necessary, &c., effect of unrecorded map, &c., see Commonwealth *v.* Allburger, 1 Whart. (Pa.) 469; Biddle *v.* Shippen, 1 Dallas, 19; Franey *v.* Miller, 1 Jones (Pa.), 435; Commonwealth *v.* Wood, 10 Barr (Pa.), 93; Winona *v.* Huff, 11 Minn. 119; Ragan *v.* McCoy, 29 Mo. 356; Chicago, &c. Railroad Company *v.* Banker, 44 Ill.; United States *v.* Chicago, 7 How. 185.

under the statute is often declared. Thus, if it be provided by statute that the map or plat, "when so made and recorded, shall be deemed to be a sufficient *conveyance to vest the fee* in the county in which such town lies," this dispenses with any assent or acceptance on the part of the public, and in this respect differs from a common law dedication.[1] It differs, also, in the mode of operation, as by the language above quoted the estate vests in the public by *conveyance* or *grant*, whereas, at common law, a dedication to public uses in cases where there is no express grant to a grantee upon consideration, operates by way of an *estoppel in pais* of the owner, rather than by a grant or the transfer of an interest in the land.[2] It should be remarked, however, that an incomplete or defective statutory dedication will, when *accepted by the public*, or when rights are acquired under it by *third persons*, operate as a common law dedication by the owner.[3]

[1] Fulton *v.* Mehrenfeld, 8 Ohio St. 440; Brown *v.* Manning, 6 Ohio, 298, 304, 1834; Baker *v.* St. Paul, 8 Minn. 491, 493, note remarks of *Flandrau*, J.; Ragan *v.* McCoy, 29 Mo. 356; Wisby *v.* Boute, 19 Ohio St. 238. See People *v.* Jones, 6 Mich. 176.

[2] *Ib. per Swan*, J., 8 Ohio St. p. 444, *supra;* Cincinnati *v.* White, 6 Pet. (U. S.) 582; Town of Paulet *v.* Clark, 9 Cranch, 202; Hunter *v.* Trustees, 6 Hill (N. Y.), 407; Curtis *v.* Keesler, 14 Barb. 521; Brown *v.* Manning, 6 Ohio, 298, 303, and cases cited; Cincinnati *v.* Commissioners, &c. 7 Ohio, pt. 1, 88; *Ib.* 217; Schurmeier *v.* Railroad Company, 10 Minn. 82, 104.

[3] 8 Ohio St. 440, *supra.* Equitable owner may dedicate, and trustee holding the mere naked legal title is bound to respect it: Williams *v.* The Church, &c. 1 Ohio St. 478; Baker *v.* St. Paul, 8 Minn. 491; Hannibal *v.* Draper, 15 Mo. 638; Ragan *v.* McCoy, 29 Mo. 356, 366, 1860; Johnson *v.* Scott, 11 Mich. 232; Doe *v.* Attica, 7 Ind. 641, 1856; Dover *v.* Fox, 9 B. Mon. 200; Banks *v.* Ogden, 2 Wall. 57; Sargent *v.* Bank, 4 McLean, 339; 12 How. 371. "The authorities show that dedications have been established in every conceivable way by which the intention of the party could be manifested:" *Per Breese*, J. in Waugh *v.* Leech, 28 Ill. 488, 1862; Alvord *v.* Ashley, 17 Ill. 363; Dunion *v.* People, *ib.* 416. Thus, the *making and recording* of a *town plat* is evidence of the highest character of the dedication of the streets and alleys marked upon it: *Ib.*; Godfrey *v.* Alton, 12 Ill. 29; Belleville *v.* Stokey, 23 Ill. 441.

Under the statutes of Kansas, the execution and recording of a plat of a city or town, conveys to the county the fee of such parcels of land as are therein expressed, named, or intended, for public use, in trust and for the uses therein named, expressed, or intended, and for no other use or purpose, and a subsequent conveyance of land thus dedicated to public uses

§ 492. Although the effect of a statutory dedication may be to grant the fee of the streets to the corporation in trust for the public uses, yet, unless prohibited by statute, *the proprietor*, in laying out a town or addition, *may grant the easement simply*, and reserve the minerals therein.[1] But such proprietor cannot confer upon a county or extraneous corporation the control of streets in a city, and thus deprive the proper municipal corporation of such control given it by law.[2]

Common Law Dedication — Rationale and Requisites.

§ 493. As to *common law dedications*, the right to make which is not usually taken away or abridged by statutory regulations respecting town plats, the subject may be advantageously presented by referring somewhat in detail to the leading case of the City of Cincinnati *v.* White,[3] decided by the Supreme Court of the United States, which has been extensively followed by the state tribunals, and is everywhere recognized

by the proprietor of the city, town, or addition, to the county, does not destroy the trust created by the execution and recording of the plat: County Commissioners *v.* Lathrop, Supreme Court of Kansas, 1872, not yet reported. Construction of *Missouri statute:* Price *v.* Thompson (as to "park"), 48 Mo. 363; Rutherford *v.* Taylor (rights of adjoining owners), 38 Mo. 315.

[1] Dubuque *v.* Benson, 23 Iowa, 248, 1867. See Noyes *v.* Ward, 19 Conn. 250, 1848; Manley *v.* Gibson, 13 Ill. 312. Words on the plat, "The streets are dedicated for *street purposes, and that only*," held to give the public only an easement, and that subterraneous mines were reserved: 23 Iowa, 248, *supra*. Dedicator may limit duration: Antones *v.* Eslava, 9 Port. (Ala.) 527.

[2] Des Moines *v.* Hall, 24 Iowa, 234, 241, 1868. In this last case, construing the Iowa statute, it was held (*Cole*, J., dissenting,) that the laying off and recording a town plat or an addition thereto, under the code, had the effect to vest in the corporation the *fee simple title* to, and exclusive right of, dominion over the streets and alleys thus dedicated to the public use, and in such case the original proprietor has no right to the *subterraneous deposits of coal* within the limits of such streets, and the corporation may maintain an action against him for coal mined and taken by him from beneath the same: *Ib.* Under the statute of Minnesota, it is held that under a statutory dedication the fee simple to land dedicated for streets, squares, &c., does not pass, but only such an estate or interest as the purposes of the trust require: Schurmeier *v.* Railroad Company, 10 Minn. 104; affirmed, 7 Wall. 272.

[3] Cincinnati *v.* White, 6 Pet. (U. S.) 431, 1832. See Noyes *v.* Ward, 19 Conn. 250; Manley *v.* Gibson, 13 Ill. 312.

as a sound exposition of the anomalous doctrines of the law respecting the rights which may be parted with by the owner and acquired by the public in this peculiar manner. In that case it appeared that in 1789 the original proprietors of Cincinnati designated, on the plan of the town, the land between Front street and the Ohio river as a common, for the use and benefit of the town forever. A few years afterwards a claim was set up to this common by a person who had procured a deed from the trustee in whom the fee of the land was vested, and who had entered upon the common and claimed the right of possession. The proof of dedication (marking on the plat accompanied by public use) being made out to the satisfaction of the court, they sustained the rights claimed by the city. At the time the plan was adopted by the proprietors, and this ground was marked on the plat as a common, they did not, in fact, possess the equitable (or legal) title to the space dedicated; but they shortly afterwards purchased the equitable title; and it was held (their assent to the dedication continuing) that under the purchase the prior dedication was good.[1]

§ 494. In its opinion in the case just mentioned, the Supreme Court assert or assent to the correctness of the following principles: 1. That it is not essential to a dedication that the legal title should pass from the owner.[2] 2. Nor is it essential that there should be any grantee of the use or easement *in esse* to take the fee, such cases being exceptions to the general rule requiring a grantee.[3] 3. Nor is a deed or writing

[1] *Per McLean*, J., in New Orleans *v.* United States, 10 Pet. 713.

[2] Lade *v.* Shepherd, 2 Stra. 1004; Beatty *v.* Kurts (dedication of lot on plan "for the Lutheran Church"), 2 Pet. (U. S.) 256; New Orleans *v.* United States, 10 Pet. 662; Dubuque *v.* Maloney, 9 Iowa, 450; Kelsey *v.* King, 33 How. Pr. 39.

[3] Town of Paulet *v.* Clark, 9 Cranch (U. S.), 292; New Orleans *v.* United States, 10 Pet. 661, 713, 1836, where *McLean*, J., says: "It is not essential that this right of use should be vested in a corporate body; it may exist in the public, and have no other limitation than the wants of the community at large." See, also, McConnell *v.* Lexington, 12 Wheat. 582; Doe *v.* Jones, 11 Ala. 63, 1847; Vick *v.* Vicksburg, 1 How. (Miss.) 379, 1837; Antones *v.* Eslava, 9 Port. (Ala.) 527; Winona *v.* Huff, 11 Minn. 119, 1866. Dedications to the public of streets, commons, &c., may, on the corporation being erected, pass to it by operation of law: Mayor of Savannah *v.* Steamboat Company, R.

necessary to constitute a valid dedication; it may be by parol.[1] 4. No specific length of possession is necessary to constitute a valid dedication; all that is required is the assent of the owner of the soil to the public use, and the actual enjoyment by the public of the use for such a length of time that the public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment.[2]

§ 495. Conformably to the foregoing principles, a proposal by a land owner to give, free of charge, and upon certain conditions to be performed by the city, so much of his land as may be required to open or widen a street or highway, will, if the proposition be accepted, and the conditions complied with, in a reasonable time, *estop such owner* from claiming damages for his land; a formal vote of acceptance is not necessary; and

M. Charlt. (Geo.) R. 342, 1830; Doe *v.* Jones, 11 Ala. 63; Klinkener *v.* School District, 1 Jones (Pa.), 444; Pella *v.* Scholte, 24 Iowa, 283, 293; Canal Trustees *v.* Havens, 11 Ill. 554; Waugh *v.* Leech, 28 Ill. 488. If no donee or trustee be named the dedication is valid, and the *legislature*, as well as chancery, may *directly* appoint trustees who may recover in ejectment: Bryant *v.* McCandless, 7 Ohio, pt. 2, 135.

[1] Barclay *v.* Howell's Lessee, 6 Pet. (U. S.) 498; Keen *v.* Lynch, 1 Rob. (Va.) 186, 1842; Dummer *v.* Jersey City, 1 Spencer (N. J.), 86, 1843; Vick *v.* Vicksburg, 1 How. (Miss.) 379, 1837; State *v.* Catlin, 3 Vt. 530; McKee *v.* St. Louis, 17 Mo. 184, 1852; Hunter *v.* Sandy Hill, 6 Hill (N. Y.), 407; Post *v.* Pearsall, 22 Wend. 425, 454; Dover *v.* Fox, 9 B. Mon. 200; Macon *v.* Franklin, 12 Geo. 239. A party *taking under a partition* in which streets were dedicated is estopped to deny dedication: Wisby *v.* Boute, 19 Ohio St. 238.

[2] Jarvis *v.* Dean, 3 Bing. 447; State *v.* Catlin, 3 Vt. 530; Barclay *v.* Howell's Lessee, 6 Pet. (U. S.) 498, 1832; Saulet *v.* New Orleans (Square), 10 La. An. 81, 1855, *per Ogden*, J.; Noyes *v.* Ward, 19 Conn. 250, 268, 1848; 2 Greenl. Ev. Sec. 662; Denning *v.* Roome, 6 Wend. 651; State *v.* Marble, 4 Ire. (Law) 318.

Lands, "after being set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an *estoppel in pais*, which precludes the orignal owner from revoking such dedication:" *Per Thompson*, J. in Cincinnati *v.* White, 6 Pet. 431, 437, 1832. As to *irrevocability of dedication*, after other rights have attached, see Macon *v.* Franklin, 12 Geo. 239, 1852; Haynes *v.* Thomas, 7 Ind. 38; Indianapolis *v.* Cross, *ib.* 9, 12; Ragan *v.* McCoy, 29 Mo. 356; State *v.* Catlin, 3 Vt. 530; Weisbrod *v.* Railroad Company, 18 Wis. 35; Commonwealth *v.* Alburger, 1 Whart. (Pa.) 469; Lee *v.* Lake, 14 Mich. 12.

seasonably fulfilling the conditions of the offer is sufficient.[1] But unless private rights have attached a common law dedication of land for a highway, street, or other public use, may, according to some authorities, be revoked by the owner at any time before there has been an acceptance by formal act of the proper authorities, or by user, as hereinafter explained, but not afterwards.[2] And a municipal corporation which has accepted a dedication of property to public use may, before vested rights have been acquired under the dedication, with the consent of the dedicator, revoke the acceptance.[3]

Extent of Dedication as Respects Dower.

§ 496. Where land is dedicated by the proprietor "for the use of the public," this has been considered to show, in the absence of statute to the contrary, an intention to give a mere *easement, and not the fee.* In such case the owner of the land, whether dedicated for the use of a highway, or street, or square, or common, retains his exclusive right in the soil for every purpose of use or profit, not inconsistent with the public easement, and may maintain appropriate actions for any encroachment upon it.[4]

[1] Crockett *v.* Boston, 5 Cush. 182, 1849. Sixteen months considering the matter to be acted upon, and the usual course of proceeding, was not considered an unreasonable time: *Ib.*

[2] Holdane *v.* Cold Springs, 21 N. Y. 474, 1860; Baldwin *v.* Buffalo, 35 N. Y. 375; S. C. 29 Barb. 396. But see Jersey City *v.* Morris Canal Company, 1 Beasl. (N. J.) 547, 1849; Weisbrod *v.* Railroad Company, 18 Wis. 35; Lee *v.* Sandy Hill, 40 N. Y. 442, 1869. Completed dedication by map held not revocable, although not accepted: M. E. Church *v.* Hoboken, 33 N. J. (Law) 13, 1868; Cook *v.* Burlington, 30 Iowa, 94, 1870. So, in California, *an acceptance by the public*, by a formal act or by actual user, is not necessary to complete a dedication where the intent to dedicate is made out: Stone *v.* Brooks, 35 Cal. 489, 1868.

As to dedication and revocation of dedication of a strip of land which was a mere *cul de sac*, see Holdane *v.* Cold Spring, 21 N. Y. 474, 1860; S. C. 23 Barb. 103; Tillman *v.* People, 12 Mich. 401; People *v.* Jackson, 7 Mich. 432; Stone *v.* Brooks, 35 Cal. 489, 1868.

[3] Municipality *v.* Levee Company, 7 La. An. 270, 1852.

[4] Lade *v.* Shepard, 2 Stra. 1004; adhered to in the recent case of the Parish, &c. *v.* Jacobs, 25 Law T. Rep. (N. S.) 800. See, also, Goodtitle *v.* Alker, 1 Burr. 153; Harrison *v.* Parker, 6 East, 154; Jackson *v.* Hathaway, 15 Johns. 447; Perley *v.* Chandler, 6 Mass. 454; Pomeroy *v.* Mills, 3 Vt. 279,

§ 497. If land dedicated to a city for public use *is bounded by a river*, the city has all the rights and privileges of a riparian proprietor as respects alluvial formations or additions; these partake of the same character and are subject to the same use as the soil to which they become united.[1] Where the shore

1831; Abbot *v.* Mills, *ib.* 521; Des Moines *v.* Hall, 24 Iowa, 234; Dubuque *v.* Maloney, 9 Iowa, 450, 1859; Boston *v.* Richardson, 13 Allen, 152, 153; White *v.* Godfrey, 97 Mass. 472; Bliss *v.* Bull, 99 Mass. 597. As respects *streets*, some explanation of the doctrine as stated in the text, if not limitations upon it, are suggested in the chapter on Streets. Note remarks of *McLean*, J., in Barclay *v.* Howell, 6 Pet. 512.

It has been definitely settled by the Court of Appeals in New York, whatever may have been the intimations or decisions in the prior cases, that as between grantor and grantee the conveyance of a lot bounded upon a street in a city, carries, in the absence of legislative provision to the contrary, the land *to the center of the street*, there being no distinction in this respect between the streets of a city and country highways. And the grantee goes to the middle of the street, though the conveyance contains no reference to the street, and the depth of the lot was stated by figures, which would not include any part of the street: Bissell *v.* The New York, &c. Railroad Company, 23 N. Y. 61, 1861, five judges concurring, three others expressing no opinion; Hammond *v.* McLachlan, 1 Sandf. 323, and Stites *v.* Curtis, 4 Day (Conn.), 328, approved. The case of Bissell *v.* Railroad Company, *supra*, approved and followed in Wager *v.* Troy, &c. Railroad Company, 25 N. Y. 526, 1862, and note remark on p. 533, as to fee of streets in city of New York; S. P. Sherman *v.* McKeon, 38 N. Y. 266, 1868. See, also, Willoughby *v.* Jenks, 20 Wend. 96, 1838. Actual possession of lot shows constructive title of occupant to middle of street: *Ib.*; John and Cherry Streets, 19 Wend. 659; Railroad Company *v.* Elevator Company, 50 Pa. St. 499; Woodruff *v.* Neal, 28 Conn. 168, 1859. Effect of *fee* being in city corporation: People *v.* Kerr, 27 N. Y. 188; Clinton *v.* Railroad Company, 24 Iowa, 455. See Chap. XVIII. on *Streets, post.*

Notwithstanding a dedication under a statute may pass the fee to the streets and alleys, yet if these are dedicated by a different mode than that prescribed by the statute, the fee remains in the adjacent proprietor as at common law, subject to the public easement: Manly *v.* Gibson, 13 Ill. 312; Dubuque *v.* Benson, 23 Iowa, 248.

[1] New Orleans *v.* United States, 10 Pet. (U. S.) 661, 1836; Cook *v.* Burlington, 30 Iowa, 94, 1870; Godfrey *v.* Alton, 12 Ill. 29, 1850; Newport *v.* Taylor, 16 B. Mon. 699, 1855. *Ante*, p. 120, Sec. 73. Dedication of streets bordering on navigable water, extends, if there be no limitation, to the water, and, in Alabama, to low water mark, and accretions belong to the public: Doe *v.* Jones, 11 Ala. 63, 1847. The Supreme Court of the United States has decided that the *title* to lands bordering on navigable streams, when derived from the general government, "stops at the stream:" Railroad Company *v.* Schurmeir, 7 Wall. 272, 289, 1868. At the "margin of the stream:" Yates

owner, through whose lands a street comes to the shore, fills in in front of his lands, and also in front of the *terminus* of the street, the public is entitled to the extension of the street the same as if the land filled in were an alluvion.[1]

Who May Dedicate. — Intent. — How Established.

§ 498. The dedication *must be by the owner* of the land, or of an estate therein.[2] A municipal corporation may, unless restricted, dedicate to public use land of which it is the proprietor.[3] Accordingly, if a town or city owning land in fee, suffer it to remain unenclosed, place a survey of the same on record, describing it as the "town common," and then permit an uninterrupted use of it by the public for a series of years, this will amount to an irrevocable dedication of the land to the public, and

v. Milwaukee, 10 Wall. 497, 504, 1870, *per Miller*, J. This last case refers to and comments on Yates *v.* Judd, 18 Wis. 118. See Wharves, *ante*, Chap. VI. p. 117; also, Chap. XV. on Corporate Property, *ante*.

[1] Jersey City *v.* Morris Canal Company, 1 Beasl. (N. J.) 547, 558, *per Whelpley*, J. See, also, People *v.* Lambier, 5 Denio, 9, 1847; Henshaw *v.* Hunting, 1 Gray, 203; Cook *v.* Burlington, 30 Iowa, 94, 1870. Dedication of streets, &c., under tide water: Morris Canal Company *v.* Jersey City, 1 Beasl. (N. J.) 252; S. C. on appeal, *ib.* 547; Jersey City *v.* Dummer, Spenc. (N. J.) 106; Henshaw *v.* Hunting, 1 Gray (Mass.), 203.

[2] Hoole *v.* Attorney General, 22 Ala. 190; Irwin *v.* Dixion, 9 How. 10; Lee *v.* Lak ·, 14 Mich. 12; Leland *v.* Portland, 2 Oregon, 46. *Remainder man* not bound by acts of the owner of a particular estate unless his assent can be shown or implied: 2 Smith Lead. Cas. 95. *By agent of owner:* United States *v.* Chicago, 7 How. (U. S.) 185; Barclay *v.* Howell's Lessee, 6 Pet. 498. An agent laid out a town plat with "public square;" the proprietors denied his authority — but it was held, that having conveyed property by adopting his numbers, referring to the "recorded town plat," and "public square," his act was ratified, and these facts were sufficient proof of his authority: Brown *v.* Manning, 6 Ohio, 298, 1834. *By administrator:* Logansport *v.* Dunn, 8 Ind. 378, 1856. Presumption from long use by public against *married woman:* Schenley *v.* Commonwealth, 36 Pa. St. 29. *Dedication by married woman:* Todd *v.* Railroad Company, 19 Ohio St. 514. *Widow not dowable* in property dedicated to public uses: Gwynne *v.* Cincinnati (bill for dower in market house), 3 Ohio, 25, 1827; Moore *v.* Mayor, &c. of New York, 8 N. Y. 110, 1853. *Ante*, Sec. 459.

[3] Boston *v.* Lecraw, 17 How. (U. S.) 426; State *v.* Woodward, 23 Vt. 92, 1850; Wright *v.* Victoria, 4 Texas, 375; Macon *v.* Franklin, 12 Geo. 239. Corporation may dedicate: Canal Company *v.* Hall, 1 M. & Gr. 393; Green *v.* Canaan, 29 Conn. 157; San Francisco *v.* Calderwood, 31 Cal. 585.

the subsequent grantee of the corporation would obtain no title.[1] But if a title in fee to a piece of land be in the municipal corporation, although it was purchased by it for a market, and constantly used for that purpose for forty years, the land is not thereby dedicated for market purposes, but the market may be changed or abandoned, and the tax payers or others cannot object, since the power to establish and regulate markets is a continuing one, and the land thus used for market purposes may be sold by the corporation.[2]

§ 499. An *intent* on the part of the owner *to dedicate* is absolutely essential, and unless such intention can be found in the facts and circumstances of the particular case, no dedication exists. Where a plat is made and recorded the requisite intention is generally indisputable. But the intention may also be established by parol evidence of acts or declarations which show an assent on the part of the owner of the land that the land should be used for public purposes. To deprive the proprietor of his land, the intent to dedicate should clearly or satisfactorily appear.[3]

[1] State *v.* Woodward (indictment for enclosing public common), *supra.*

[2] Gall *v.* Cincinnati, 18 Ohio St. 563, 1869. See, also, Boston *v.* Lecraw, 17 How. (U. S.) 426, 1854, cited *ante*, p. 121, note 1.

[3] Irwin *v.* Dixion, 9 How. 10; The President, &c *v.* Indianapolis, 12 Ind. 620, 1839; Logansport *v.* Dunn, 8 Ind, 378; Pennington *v.* Willard, 1 Rh Is. 93; Westfall *v.* Hunter, 8 Ind. 174; Cincinnati *v.* White, 6 Pet. 435; Wilson *v.* Sexon, 27 Iowa, 15; Onstott *v* Murray, 22 Iowa, 466; Manderschid *v.* Dubuque, 29 Iowa, 73.

"The doctrine of all the authorities is, that the *intention* to dedicate land to the public use is of the very essence of the act; but this intention may be proved as a fact or inferred from circumstances:" *Per Potts*, J., Smith *v.* State, 3 Zabr (N. J.) 712, 725; Lee *v.* Lake, 14 Mich. 12; Stuyvesant *v.* Woodruff, 1 *ib.* 145; Mayo *v.* Murchie, 3 Munf. (Va.) 358, 1811. May be shown by acts *in pais:* Town Council *v.* Lithgoe, 7 Rich. (Law) 435; Angell on Highways, Sec. 132.

Proof of dedication and acts which will estop original proprietor or his grantee, with notice, from resuming the lands set apart to the public, consult Commonwealth *v.* Alburger, 1 Whart. (Pa) 469; State *v* Wilkinson, 2 Vt. 480; Abbott *v.* Mills, 3 *ib.* 521; Pomeroy *v.* Mills, *ib.* 279; State *v.* Catlin, *ib.* 530; State *v.* Woodward, 23 *ib.* 92. *Declarations of owner* of soil admissible to show a dedication to public use: State *v.* Catlin, 3 Vt. 530, 1831; McKee *v.* St. Louis, 17 Mo. 184. Declarations of *deceased surveyor*, at the time of making survey, were admitted as part of the *res gestæ:* Barclay *v.* How-

Effect of Long User and Acquiescence.

§ 500. But such *intent will be presumed* against the owner where it appears that the easement in the street or property *has been used and enjoyed by the public* for a period corresponding with the statutory limitation of real actions. But where there is no other evidence against the owner to support the dedication but the *mere fact* of such user,[1] so that the right claimed

ell's Lessee, 6 Pet. 498; referred to by *McLean*, J., 10 Pet. 714; Birmingham *v.* Anderson, 40 Pa. St. 506. Where the owner is interested to prove a dedication, he will be held to strict proof: Rector *v.* Hartt, 8 Mo 448.

Where the dedication is specific and certain, as, for example, the words, "public ground," or "public square," on the recorded plat, *parol testimony* is not receivable to establish or affect the intention of the donors, and, therefore, in such a case, the donors cannot show, by evidence *aliunde*, that they designed the square for a court house, and if no court house should be erected, then to resume it, or appropriate it to a seminary of learning: Brown *v.* Manning, 6 Ohio, 298, 1834. *Contra*, Westfall *v.* Hunt, 8 Ind. 174, but *quære*, as to competency of the parol evidence to show the intent. See Indianapolis *v.* Croas, 7 Ind. 9; Cincinnati *v.* Hamilton County, 7 Ohio, part 1, 88, dedication "for public uses,"—contest between city and county; Lebanon *v.* Commissioners ("public ground" contest as to square between town and county), 9 Ohio, 80. See Darlington *v.* Commonwealth, 41 Pa. St. 63.

[1] Remington *v.* Willard, 1 Rh. Is. 93, 1847; Thayer *v* Boston, 19 Pick. 511, 1837; Talbott *v.* Grace, 30 Ind. 389, 1868; Keyes *v.* Tait, 19 Iowa, 123; Green *v.* Oaks, 17 Ill 249; Smith *v.* State, 3 Zabr. 130; affirmed, *ib* 712; Onstott *v.* Murray, 22 Iowa, 457, 1867, where conflict in the cases is noticed, and where it is held, that if the public, with the knowledge of the owner of the land, even though it be unenclosed prairie or timber land, has claimed and exercised the right of using the same for a public highway for a period equal to that fixed by the statute limiting real actions, the public right is complete, unless such use be by favor or leave of the owner. Mandershid *v.* Dubuque, 29 Iowa, 73. In Pennsylvania, the Supreme Court holds the law to be, "that the use of ground by the public as a highway for more than twenty-one years makes it a public road just as effectually as though it had originally been laid out and opened by the proper authorities:" *Per Knox* J., Commonwealth *v.* Cole, 26 Pa. St. 187, 1856; Thayer *v.* Boston, 19 Pick. 511, 514, *per Shaw*, C. J. And the same principle is adopted as to sidewalks and streets: Bush *v.* Johnston, 23 Pa. St. 209, 1854. It is held in Massachusetts that a *town* way can only be established in the mode prescribed by statute; though a town may acquire a right of way by grant or user, it will be a private way, and obstructions to it not indictable: Commonwealth *v.* Low, 3 Pick. 408, 1826. But see Commonwealth *v.* Belden, 13 Met. 10, 1847; State *v.* Bradbury, 40 Maine, 154, 1855; State *v.* Wilson, 42 Maine, 9, 1856.

by the public is purely prescriptive, it is essential to maintain it, that the user or enjoyment should be adverse, that it is with claim of right, and uninterrupted and exclusive for the requisite length of time; but when it is said that it must be uninterrupted, this refers to the *right*, and not simply to an interruption, of the *use*.[1]

§ 501. But where the question is as to an *intent* on the part of the owner *to dedicate*, *user by the public* for a period less than that limiting real actions, is important as evidence of such intention, and as one of the facts from which it may be inferred. Where the *animus dedicandi* is established, no user for any definite period by the public is necessary.[2] "No particular time," says an English judge, "is necessary for evidence of a dedication. If the act of dedication be unequivocal, it may take place immediately. For instance, if a man build a double row of houses opening into an ancient street at each end, making a street, and sells or lets the houses, that is *instantly* a highway." [3]

§ 502. A street may be *widened* by the dedication of a strip of land adjoining it, and such dedication may be shown by long use by the public, and acquiescence in such use by the owner. And if a street has been long used and built upon to

[1] 2 Greenl. Ev. Tit Prescription, Secs. 537–546.

[2] Hoole *v.* Attorney General, 22 Ala. 190; Boyer *v.* State, 16 Ind. 451; Evansville *v.* Paige, 23 Ind. 525; Cincinnati *v.* White, 6 Pet. 431; Barclay *v.* Howell, 6 Pet 498; Irwin *v.* Dixion, 9 How. 10; State *v.* Wilkinson, 2 Vt. 480; Hunter *v.* Sandy Hill, 6 Hill, 407. Proof by user: See Gamble *v* St. Louis, 12 Mo. 617; Lewis *v.* San Antonio, 7 Texas, 288; New Orleans *v.* United States, 10 Pet. 661; 722; Weisbrod *v.* Railroad Company, 18 Wis. 35; Doe *v.* Jones, 11 Ala. 63, 1847; 2 Smith Lead. Cas. 95; Onstott *v.* Murray, 22 Iowa, 457; Pella *v.* Scholte, 24 Iowa, 283; Sanlet *v.* New Orleans, 10 La. An. 81.

What acts will repel presumption of dedication arising from owner's knowledge of the use by the public: Durgin *v.* Lowell, 3 Allen, 398; Skeen *v.* Lynch, 1 Rob. (Va) 186, 194; Roberts *v.* Karr, 1 Campb. 262, note; *Ib* 263, note; Schoomaker *v.* Church, 5 How. Pr. 265; 2 Smith Lead. Cas. 176. Upon the question of dedication, *non-user* is important, but not conclusive, evidence against the public: Barclay *v.* Howell's Lessee, 6 Pet. 498. Effect of *occupancy by alleged dedicator:* Cook *v.* Hillsdale, 7 Mich. 115, 1859.

[3] Woodyer *v.* Hadden, 5 Taunt. 125, *per Chambre*, J.; 2 Smith Lead. Cas. 176.

a particular line, which line has been acquiesced in by the adjoining owners, who have built and made improvements to correspond with such line, such owners and the public acquire rights in consequence, and one or more of such owners cannot afterwards change or narrow the street by showing that the original survey made the line of the street different from that which had been long regarded, built upon and acquiesced in as the line of the street.[1]

Effect of Platting and Sale of Lots.

§ 503. While a mere survey of land, by the owner, into lots, defining streets, squares, &c., will not, without a sale, amount to a dedication,[2] yet a *a sale of lots with reference to such plat*, or describing lots as bounded by streets, will amount to an immediate and irrevocable dedication of the latter, binding upon both vendor and vendee.[3]

[1] Smith *v.* State, 3 Zabr. (N. J.) 712, 1852; affirming, S. C. *ib.* 130. In this case the different owners had acquiesced in the line built upon, and treated it as the true line for forty or fifty years. The defendant, disregarding this line, built out into the street some four or five feet. He was indicted for the nuisance thus created, and convicted, the court holding the rights of the public had attached, and that it was no defence to show that the building erected was on the line of the street as originally surveyed A road or street which becomes a public highway by user is of no established *width* by law; its width, as used at the time when the rights of the public become complete, is the established or legal width of the highway: Hart *v.* Township, 15 Ind. 226, 1860; 5 *ib.* 459. See Darlington *v.* Commonwealth, 41 Pa. St. 63.

[2] United States *v.* Chicago, 7 How (U. S). 185, 196.

[3] Rowan *v.* Portland, 8 B. Mon. 232, 1847; Augusta *v.* Perkins, *ib.* 207; County *v.* Newport, 12 *ib.* 538; Wickliffe *v.* Lexington, 11 *ib.* 155; Newport *v.* Taylor, 16 *ib.* 699, 1855; Stone *v.* Brooks, 35 Cal. 489, 1868; Cook *v.* Burlington, 30 Iowa, 94, 1870; Hannibal *v.* Draper, 15 Mo. 634, 1852; Schenley *v.* Commonwealth, 36 Pa. St. 62, 1859; Doe *v.* Attica, 7 Ind. 641, 644, 1856; Wyman *v.* New York, 11 Wend 487; Livingston *v.* New York, 8 Wend. 85; McKenna *v.* Commissioners, Harper (South Car.), Law, 381; White *v.* Cower, 4 Paige, 510; Barclay *v.* Howell, 6 Pet. 498, 506; 10 *ib.* 718; Town Council *v.* Lithgoe, 7 Rich. (Law), 435; Dubuque *v.* Maloney, 9 Iowa, 450; Pope *v.* Union, 18 N. J. Eq. 282. Purchaser's right extends to have *all streets*, &c., remain public which were marked on the plan exhibited by the proprietor: Rowan *v.* Portland, 8 B. Mon. 232, 1847; Winona *v.* Huff, 11 Minn. 119; Huber *v.* Gazley, 18 Ohio, 18; 2 Smith Lead. Cas. 181; Logansport *v.* Dunn, 8 Ind. 378; Dubuque *v.* Maloney, *supra.*

§ 504. A dedication of land for a public square *was not*, under the circumstances of the case, *implied* against the heirs of the grantor from its representation as a *mere blank*, undistinguished from, and continuous with, the streets surrounding it, upon a partition map made by such heirs, and by reference to which they conveyed lots.[1]

Acceptance by the Public — When, and for What Purpose, Necessary.

§ 505. As against the proprietor, a dedication of land for streets and highways may be complete without any act or acceptance on the part of the public; but in order to charge the municipality or local district with the duty to repair, or to

So, in Maryland, it is laid down, "that where a party sells property lying within the limits of the city, and in the conveyance bounds such property by streets designated *as such* in the conveyance, or on a map made by the city, or by the owner of the property, such a sale implies, necessarily, a covenant that the *purchaser* shall have the use of such streets:" Moale *v.* Baltimore, 5 Md. 314, 321, 1854; following, White *v.* Flannigan, 1 Md. 525, 540, 1852; distinguished from Underwood *v.* Stuyvesant, 19 Johns. 186; Howard *v* Rodgers, 4 Harr. & Johns. 278.

Dedication where the conveyance bounds the purchasers by a street or public square, designated on a map, see People *v.* Lambier, 5 Denio, 9, 19; Thirty-second Street, 19 Wend. 128; followed in Twenty-ninth Street, 1 Hill, 189; *Ib.* 191; Furman Street, 17 Wend. 649; 8 *ib.* 85; 20 *ib.* 96; 2 Seld. 257; 6 Ohio, 298; Smith *v.* Lock, 18 Mich. 56, 1869; M. E. Church *v.* Hoboken, 33 N. J. (Law) 13, 1868.

[1] Mayor, &c. of New York *v.* Stuyvesant, 17 N. Y. 34, 1858. Mere unnumbered triangular space in plat, bounded by streets, without user by the public or other evidence of public right, held not to establish a dedication of such space as a common: Oswald *v.* Grenet, 15 Texas, 118, 1855.

Mode of platting, and peculiarities of lines and spaces on plats as showing an intention to dedicate, or the reverse: See Sanlet *v.* New Orleans, 10 La. An. 81; Yates *v.* Judd, 18 Wis. 118; Municipality *v.* Palfrey, 7 La. An. 497; Livandais *v.* Municpality, 5 *ib.* 8; Xiquer *v.* Bujac, *ib.* 499; Barclay *v.* Howell's Lessee, 6 Pet. 498. *Water Street*, with open space on river side: 10 Pet. 714. Opposite case with both lines of Water Street defined and width indicated: McLaughlin *v.* Stevens, 18 Ohio, 94, 1849, distinguished from Barclay *v.* Howell's Lessee, *supra;* United States *v.* Chicago, 7 How. 185; Commonwealth *v.* Alburger, 1 Whart. (Pa.) 469; Penny Pot Landing Case, 16 Pa. St. 79; Commonwealth *v.* McDonald, 16 Serg & Rawle, 390; Cowles *v.* Gray, 14 Iowa, 1; Grant *v.* Davenport, 18 Iowa, 179; Perrin *v.* Railroad Company, 36 N. Y. 120; Cook *v.* Hillsdale, 7 Mich. 115, 1859; Newport *v.* Taylor, 16 B. Mon. 699, 1855.

make it liable for injuries, for suffering the street or highway to be or remain defective, there must be an *acceptance* of the dedication. And this acceptance must be by the *proper or authorized* local public authorities. It may be express and appear of record, or it may be implied from repairs made and ordered, or knowingly paid for by the authority which has the legal power to adopt the street or highway,[1] or from long user by the public.[2]

[1] State *v.* Wilson, 42 Maine, 9, 1856; State of Maine *v.* Bradbury, 40 Maine, 154, where it was held, that as a *surveyor* of highways had no power to *accept* a dedication, repairs made by him did not constitute an acceptance binding upon the town: Oswego *v.* Oswego Canal Company, 2 Seld. 257; Remington *v.* Millard, 1 Rh Is. 93; 2 *ib.* 172, 493; State *v.* Carver, 5 Strob. (South Car.) 217; Jennings *v.* Tisbury, 5 Gray, 73; Kelly's Case, 8 Gratt. (Va.) 632; Bowman *v.* Boston, 5 Cush. 1; Hyde *v.* Jamaica, 27 Vt. 443; Folsom *v.* Underhill, 36 Vt. 580; Commonwealth *v* Belden, 13 Met. 10; Curtis *v.* Hope, 19 Conn. 154; 2 Greenl. Ev. Sec. 662. See, on this subject, Hobbs *v.* Lowell, 19 Pick. 415; Teagarden *v.* McBean, 33 Miss. 283; Sampson *v.* Justices, 5 Gratt. (Va.) 241, 1848; Holmes *v.* Jersey City, 1 Beasl. (N. J.) 299; Jersey City *v.* State, 1 Vroom, 521; State *v.* Johnson, 11 Ire. (Law) 647, 659; Pope *v.* Union, 3 C. E. Green. Proof of acceptance of street by town council digging a well therein: Town Council *v.* Lithgoe, 7 Rich. (Law) 435. Other proof of adoption: Blodgett *v.* Royalton, 17 Vt. 40; Emery *v.* Washington, 1 Brayton (Vt.), 128. In Michigan it has been several times decided, that an acceptance of a plat containing streets, &c., by the proper authorities, in behalf of the public, was essential to a complete dedication: People *v.* Jones, 6 Mich. 176; Tillman *v.* People, 12 Mich. 401. In Connecticut the whole matter of the dedication and acceptance of highways and streets, there being no statute on the subject, rests on the principles of the common law, and the reasonable doctrine is maintained that an acceptance by the public will be presumed when clearly beneficial, of which the actual use will be strong evidence; but a reasonable time is to be allowed for such acceptance, and in the case of a city street opened for settlement upon it, a reasonable time would be the time required for the settlement of the adjoining lots: Guthrie *v.* New Haven, 31 Conn. 308, 1863. The acceptance, on the part of an incorporated town or city, of an amended charter, which includes an addition previously laid off and platted, amounts to an acceptance of such addition and the streets and alleys therein: Des Moines *v.* Hall, 24 Iowa, 234, 1868. Under the Ohio municipal corporations act, a city cannot be charged with the duty of repairing streets dedicated, unless its assent to the dedication be given: Wisby *v.* Boute, 19 Ohio St. 238.

[2] Commonwealth *v.* Belden, 13 Met. 10, 1847; Hemphill *v.* Boston, 8 Cush. 195, 1851; Jennings *v.* Tisbury, 5 Gray, 73, 1855; Hayden *v.* Attleborough, 7 Gray, 338; Manderschid *v.* Dubuque, 29 Iowa, 73, in which the subject is well discussed by Mr. Justice *Beck*. See, also, State *v.* New Boston,

Public Squares and their Uses.

§ 506. Taking private property for a *public square*, in a city, is taking the same for *public use*, and it may lawfully be done

11 N. H. 413, where the court says that "an express, formal dedication to the public, an acceptance by some public agent properly authorized, or by *long use* of the public, would, upon the authorities, constitute a public highway; though, unless there had been an acceptance, express or implied, it seems the road would not become a highway." By mere user alone, there being no element of dedication, and no acceptance or facts from which it can be implied, the land does not become a *public* highway, unless the user is continuous for the full statutory period; user alone for a less period is not sufficient to charge the public with the duty to repair, imposed by statute: See Jennings *v.* Tisbury, 5 Gray, 73, 1855; Rowell *v.* Montville, 4 Greenl. 270; State *v.* Bradbury, 40 Maine, 154, 1855; State *v.* Wilson, 42 Maine, 9, 1856; Commonwealth *v.* Low, 3 Pick. 408, 1826, and comments on in Commonwealth *v.* Belden, 13 Met. 10, 15, 1847; Commonwealth *v.* Charlestown, 1 Pick. 179, 1822; Reed *v.* Northfield, 13 Pick. 94, 1832; Jones *v.* Andover, 9 Pick. 146, 1829; Remington *v.* Millard, 1 Rh. Is. 93. If not a public highway, a party is not indictable for obstructing it, or a town for neglecting to repair it: Hemphill *v.* Boston, 8 Cush. 195; State *v.* Bradbury, 40 Maine, 154; Commonwealth *v.* Low, 3 Pick. 408; Commonwealth *v.* Belden, 13 Met. 10, 15; State *v.* Richmond, 1 Rh. Is. 49.

The principles in the text are well illustrated by the case of the State *v.* Carver, 5 Strob. (South Car.) Law, 217, 1850, where the defendant was indicted for obstructing two streets in an addition to a town. The streets were designated on a plat by the proprietor, and the defendant's lots were bounded thereby. Other parties were interested in the same dedication, and, against their protest, defendant fenced up the streets in front of his lots. These had never been accepted by the town authorities, or worked upon. It was held that the defendant could not be convicted on this evidence, and that the mere assertion of the public right to the streets by the prosecuting officer of the state, by indictment for their obstruction, was not sufficient. The court, admitting that there was a dedication so far as the proprietor, by any act of his, could effect it, remarked that "it is very clear, from the authorities, that without some act of acceptance or some use by the public, the owner of the land cannot create a street in a town, or a public road in the country. The reason is very clear. The opening and repairing of streets and roads impose an expense on the public, and [in this state, Commissioners *v.* Taylor, 2 Bay, 282] subject the authorities, whose duty it is to repair, to indictment for neglect of duty. Now this charge and liability can only be imposed by law, but, if the simple act of dedication could impose them, then they would be imposed, not by law, but by the will of an individual. All the cases, both English and American, sustain these positions. Rex *v.* Inhabitants of Leake, 5 Barn. & Adol. 469, does not decide that there need be no acceptance; it decides only that where a road had been established, by use, as a public road, the parish was bound to repair, without any act of adoption. The use by the public was

on compensation being made; and the mode of compensation, whether by a tax upon the whole city, or upon those specially benefited, is a matter for legislative regulation.[1]

§ 507. The doctrine of dedication to public use has also been extended and applied to *public squares* in cities and villages, these being regarded as easements for the benefit of the public, and the fact of dedication may be established in the same manner as in the case of highways and streets.[2]

the same as adoption by the parish." Followed, Town Council *v.* Lithgoe, 7 Rich. (South Car.) Law, 435, 1854. Liability of public to repair, adopted as test to determine whether a road is public or private: Teagarden *v.* McBean, 33 Miss. 283; State *v.* Gregg, 2 Hill (South Car.), 388; Smith *v.* Kinard, *ib.* 642.

[1] Owners, &c. *v.* Mayor, &c. 15 Wend. 374, 1836; Bouton *v.* Brooklyn, 15 Barb. 375, 384 (as to assessment for *park*). See chapter on Eminent Domain, *ante*, and on Taxation, *post*.

[2] Commonwealth *v.* Rush, 14 Pa. St. 186, 1850; State *v.* Wilkinson, 2 Vt. 480. Indictment for obstructing public square of St. Albans by a building: Abbott *v.* Mills, 3 Vt. 521; State *v.* Catlin, *ib.* 530, as to Burlington Common, or Court House Square, and College Green; State *v.* Trask, 6 Vt. 355; Watertown *v.* Cowen, 4 Paige Ch. (N. Y.) 510, as to village square laid out by proprietor, following the doctrine of Cincinnati *v.* White, 6 Peters, 431; Huber *v.* Gazley, 18 Ohio, 18; Leclerq *v.* Gallipolis, 7 Ohio, pt. 1, 88; Pearsall *v.* Post, 20 Wend. 111, 117; S. C. 22 Wend. 425, 433, 451, 454; Winona *v.* Huff, 11 Minn. 119; Doe *v.* Attica, 7 Ind. 641; Heirs of Reynolds *v.* Commissioners, &c. 5 Ohio, 204 (donation for "county buildings"); Smith *v.* Heuston (donation for "public [county] buildings"), 6 Ohio, 101; Brown *v.* Manning ("P. Square"), 6 Ohio, 298; Lebanon *v.* Commissioners, &c. ("public ground") 9 Ohio, 80; Dover *v.* Fox, 9 B. Mon. 200.

"Whenever a public square or common is marked out or set apart as such by the owners, and individuals are induced to purchase lots or lands bordering thereon, in the expectation held out by the proprietor that it should so remain; or even if there are no marks upon the ground, but a map or plan is made and lots marked thereon and sold as such, it is not competent for the proprietors to disappoint the expectations of the purchasers by resuming the lands thus set apart and appropriating them to any other use:" *Per Williams*, J., in Abbott *v.* Mills (Court House Square), 3 Vt. 526; Price *v.* Thompson, 48 Mo. 363.

Nature and effect of a conveyance of land to trustees, with an election to them to dedicate as a public square or not, as they might see fit, see Mayor, &c. of New York *v.* Stuyvesant, 17 N. Y. 34, 1858; 11 Paige, 414.

Conveyance on condition that the land be used only for a *town house:* French *v.* Quincy, 3 Allen, 9.

The conveyance of a block of ground for the use of the public as a "*court house square,*" creates a trust which is not executed by a sale of the

§ 508. Where the words "public square" are used on a plat, this is an unrestricted dedication to public use,[1] and the use varies according to circumstances, to be judged of and directed by the proper local authorities or corporate guardian, subject to the control of the laws and the courts.[2] The local authorities have, however, no implied power to authorize private dwelling houses or other private structures to be erected thereon, and, if erected, they are public and indictable nuisances.[3] It has been held, that, under circumstances, the corporate authorities may authorize the use thereof for public buildings, but the right to erect county buildings upon the public square of a county town, is regarded by Chief Justice *Gibson* as resting alone on a usage which, in Pennsylvania, "has acquired the consistence of law."[4]

block or a portion of it, and the application of the proceeds to the erection of a court house: County Commissioners *v.* Lathrop, Supreme Court of Kansas, 1872.

[1] Commonwealth *v.* Rush, 14 Pa. St. 186, 1850; Commonwealth *v.* Bowman, 3 Barr, 203; Alton *v.* Transportation Company, 12 Ill. 60. "Place," as used in plats of towns, "is a French word, and means a public place surrounded by buildings, kept open for the embellishment of a city or the convenience of its commerce:" *Per Preston*, J., in Xiques *v.* Bujac, 7 La. An. 499, 510, 1852; Langley *v.* Gallipolis, 2 Ohio St. 107. *Indefinite location:* Ring *v.* Schoenberger, 2 Watts, 23.

[2] Commonwealth *v.* Alburger, 1 Whart. (Pa.) 469, *per Sergeant*, J.; referred to by *Gibson*, C. J., Commonwealth *v.* Bowman, *supra*.

[3] Commonwealth *v.* Rush, 14 Pa. St. 186; State *v.* Atkinson, 24 Vt. 448, 1852; Hutchinson *v.* Pratt, 11 Vt. 402, 423, *per Williams*, C. J.; Pomeroy *v.* Mills, 3 Vt. 279; State *v.* Woodward, 23 Vt. 92, 1850; Columbus *v.* Jacques (market house in street), 30 Geo. 506; State *v.* Mobile, 5 Port. (Ala.) 279; People *v.* Carpenter, 2 Doug. (Mich.) 273, 1849; Cooper *v.* Alden, Harring. Ch. (Mich.) 72. As to erections, under the civil law, upon lands dedicated to public use, see New Orleans *v.* United States, 10 Pet. 661, 725, 735, *per McLean*, J.

[4] Langley *v.* Gallipolis, 2 Ohio St. 107, 110, 1853, *per Bartley*, C. J.; Commonwealth *v.* Bowman, 3 Pa. St. 203, 1846. In this case the defendants were indicted for occupying, by authority from the county commissioners, a building upon the square (dedicated without restriction) of an incorporated town. *Gibson*, C. J., said: "The public square is as much a highway as if it were a street, and neither the county nor the public can block it up, to the prejudice of the public or of an individual. * * It is dedicated to the use of all of the citizens as a highway, and all have a right to pass over it without unreasonable let or hindrance—in which respect it differs from the public squares in Philadelphia, which are dedicated to health and re-

§ 509. The *uses and purposes* of a *public square* or *commons* are, in some respects, different from those of a public *highway*. Thus, a street or highway cannot be enclosed by the local authorities. But a public square or common in a town or city where the dedication is general, and without special limitation or use, may be enclosed, notwithstanding it has remained open for many years and improved and ornamented for recreation and health. But the place must, for the purpose of the dedication, remain free and common to the use of all the public.[1]

creation, and which are necessarily subjected to regulation by the local authorities." The case, however, recognizes the right of the county to reasonable accommodation for its court house and public offices in the great square of the county town, the foundation of this right being, as expressed by *Gibson*, C. J., "one of the usages of our state, which has acquired the consistence of law." The extent of the right is limited to the single purpose sanctioned by the usage: Commonwealth *v.* Bowman, 3 Pa. St. 203, 1846. In Indiana, it is said by *Davison*, J., *arguendo*, in Westfall *v.* Hunt, 8 Ind. 174, that "the phrase, '*public square*,' when used in our statutes — as also in its popular import — refers almost exclusively to grounds occupied by the court house and owned by the county." Control of public square within the limits of the city corporation, on which a court house and jail were situated, held to be in the city authorities, against whose ordinance the county authorities could not create a nuisance by the erection of horse-racks thereon: Samuels *v.* Nashville, 3 Sneed (Tenn.), 298, 1855.

Respective rights of *city* and *county* in square, and effect of abandonment by county: County *v.* Newport, 12 B. Mon. 538, 1851; Augusta *v.* Perkins, 8 *ib.* 207; Rutherford *v.* Taylor, 38 Mo. 315.

[1] Langley *v.* Gallipolis, 2 Ohio St. 107, 1853.

May be enclosed and ornamented: Hutchinson *v.* Pratt, 11 Vt. 402, 423, 1839, where *Williams*, C. J., points out some of the differences between public squares and commons and highways; Leftwich *v.* Mayor, 14 La. An. 152, 1849. In this case, *Merrick*, C. J., observes: "As a public square is not designed as a highway or thoroughfare for all sorts of conveyances, but is intended as an ornament of a town and place of recreation and amusement, the corporate authorities may enclose the same." Compare remarks of *Gibson*, C. J., in Commonwealth *v.* Bowman, *supra*, Sec. 508, note.

"Square" defined: M. E. Church *v.* Hoboken, 33 N. J. (Law) 13, 1868.

"By a 'town common,' in common parlance, is understood an enclosed or unenclosed place belonging to the town, and in which no individual has a private property:" *Per Gaston*, J., in Commissioners *v.* Boyd, 1 Ire. (Law) 194, 1840.

Ferry right of riparian donor on the dedicated front or commons recognized as reserved by him by reason of long user and acquiescence therein by the public: Newport *v.* Taylor, 16 B. Mon. 699, 1855. As to ferries, see *ante*, Chap. VI. p. 117.

Dedication for Other Purposes.

§ 510. Property may also be dedicated in writing or by parol, to other municipal, public, or charitable uses, such as church squares or lots;[1] for a burying-ground;[2] for markets;[3] for public buildings;[4] for school purposes;[5] and for purposes of recreation and ornament.[6] But the use must be a public one.[7]

[1] Antones *v.* Eslava, 9 Port. (Ala.) 527, 1839; Hannibal *v.* Draper, 15 Mo. 634, 1852. Church lots on plat held to be a dedication for a public purpose, in which the municipality has an interest, and can eject the dedicator or his grantee. But Mr. Chief Justice *Eustes's* opinion is, that by such a designation the property is not *locus publicus*, but private: Xiques *v.* Bujac, 7 La. An. 449. In this case, relating to "Annunciation Place," or "Square," the civil law relating to dedications—and particularly dedications for church purposes—is very fully considered.

Under general dedication of "Church Square," what church entitled: Christian Church *v.* Scholte, 2 Iowa, 27; Chapman *v.* Gordon, 29 Geo. 250; Beatty *v.* Kurtz, 2 Pet. C. C. R. 566; Shapleigh *v.* Pillsbury, 1 Greenl. (Me.) 271, 280; Rice *v.* Osgood, 9 Mass. 38; Pearsall *v.* Post, 20 Wend. 111, 118, *per Cowen*, J.

[2] Hunter *v.* Sandy Hill, 6 Hill (N. Y.), 407, 1844; criticised, 2 Smith Lead. Cas. 4th ed. 193. See, also, Post *v.* Pearsall, 22 Wend. 425, 454.

[3] Dummer *v.* Jersey City, 1 Spencer (N. J.), 86, 1843; The President, &c. *v.* Indianapolis, 12 Ind. 620.

[4] Heirs of Reynolds *v.* Commissioners, 5 Ohio, 204; Smith *v.* Hueston, 6 Ohio, 101; *Ib.* 298, 305.

[5] Klinkener *v.* School District, 11 Pa. St. 444.

[6] Pella *v.* Scholte, 24 Iowa, 283. The words on a plat, "*Garden Square*," held not necessarily to imply a dedication: *Ib.* So of the words, "*Spencer Square*:" Logansport *v.* Dunn, 8 Ind. 378. Square marked "*Coliseum*:" Livandais *v.* Municipality, 16 La. 512; Xiques *v.* Bujac, 7 La. An. 499; Cox *v.* Griffin, 18 Geo. 728. The word "*Park*" on plat construed; Perrin *v.* Railroad Company, 36 N. Y. 120; Price *v.* Thompson, 38 Mo. 363, In this last case it was held, that under the statute of Missouri, respecting the dedication of property to public use, the corporate authorities of a town could not, against the objection of the adjoining lot owners, lay out a street through a public park, as this was a diversion of the use. Whether they could do this under the delegated power of eminent domain on payment of damages was not determined. Rights of adjacent owners: See chapter on Streets, *post.*

Servitudes of view arising from dedication to public use; French *v.* Railroad Company, 2 La. An. 80.

[7] Todd *v.* Railroad Company, 19 Ohio St. 514. Marking on plat a lot, "Depot of O. & P. Railroad," does not dedicate it: *Ib.*; S. P. McWilliams *v.* Morgan, Ill. Supreme Court, January, 1872, not yet reported.

§ 511. Lands dedicated to the public, without restriction, upon the *margin of a navigable river*, may be used for a *landing or wharf*, as well as purposes of passage.[1] Upon the adjudged cases there exists some doubt whether the public can prescribe for or claim, by way of implied or common law dedication, land for a *public landing*. There may be an express dedication for this purpose, and, on principle, within the limits of a municipality bordering on navigable waters, it would seem to be going too far to say, that in no case can a common law dedication of land for a public wharf or landing be shown by user, and the proprietor estopped from denying the right of the public to such use.[2]

Alienation and Change of Use.

§ 512. A municipal corporation has no *implied or incidental authority to alien* or dispose of, for its own benefit, property dedicated to or held by it in trust for the public use, nor can

[1] Newport *v.* Taylor, 16 B. Mon. 699, 1855; Godfrey *v.* Alton, 12 Ill. 29, 1850; Alton *v.* Transportation Company, 12 Ill. 60; Mayor *v.* Wright, 6 Yerg. (Tenn.) 497, 1834. In this last case it was held, that a part of the *public promenade* might, by the direction of the city, be converted into a landing or wharf. The opinion asserts, *arguendo*, a measure of power in the corporation over the public property entirely too broad. As to Wharves, see *ante*, Chap. V. p. 117, *et seq.*

[2] Denying that the principle of implied dedication of public ways, squares, &c., by long user and acquiescence, extends to *public landings*, see Pearsall *v.* Post, 20 Wend. 111, 1838; affirmed, 22 Wend. 425. In these cases the history and nature of dedications to public use are learnedly considered, and the numerous cases collected, digested, and commented on. Same principle, Bethum *v.* Turner, 1 Greenl. (Me.) 111; State *v.* Wilson, 42 Maine, 9, where the *nature* of landings and the respective rights of the owner of the soil and the public are elaborately considered; Littlefield *v.* Maxwell, 31 Maine, 134. But that there may be a prescriptive right to, or a dedication of, public landings, see Penny Pot Landing, 16 Pa. St. 79, 1851; Coolidge *v.* Learned, 8 Pick. 504; Municipality *v.* Kirk, 5 La. An. 34.

The words, "*reserved landing*," on proprietor's recorded plat, held to indicate intention not to dedicate: Grant *v.* Davenport, 18 Iowa, 179; Cowles *v.* Gray, 14 Iowa, 1. Where land is dedicated as a "commons" along a navigable street, the public authorities may build wharves: Newport *v.* Taylor, 16 B. Mon. 699, 1855.

it extinguish the public uses in such property, nor is such property subject to the payment of the debts of the municipality.[1]

§ 513. How far the *legislature has the power* to confer upon the municipality authority to dispose of lands held for such purposes is a more difficult question, and depends, we should say, upon the nature and extent of the dedication. As between the municipality and the general public, the legislative power is supreme. And so it is in all cases where there are no private rights involved. If the municipal corporation holds the full title to the ground for public uses, without restriction, the

[1] M. E. Church *v.* Hoboken, 33 N. J. (Law) 13, 1868; Augusta *v.* Perkins, 3 B. Mon. 437; Buckner *v.* Augusta, 1 A. K. Marsh. 9; Alves *v.* Henderson, 16 B. Mon. 131, 168, 1855; Kennedy *v.* Covington, 8 Dana, 50; Rutherford *v.* Taylor, 38 Mo. 315; Price *v.* Thompson, 48 Mo. 363; Alton *v.* Transportation Company, 12 Ill. 60; San Antonio *v.* Lewis (plaza or commons), 15 Texas, 388, 1855; 7 *ib.* 288; New Orleans *v.* United States, 10 Pet. 734; Warren *v.* Lyons City, 22 Iowa, 351, 1867; Ransom *v.* Boal, 29 Iowa, 68, 1870; Branham *v.* San Jose, 24 Cal. 585, 1864. And see the learned and valuable opinion of *Baldwin*, J., in Hart *v.* Burnett, 15 Cal. 580, as to the power of the Spanish municipal authorities over the lands of the pueblo.

A city council *cannot sell a public square* without authority from the legislature, even though the corporation holds it "for such public uses as the council may, from time to time, direct and ordain," and the object of selling is to apply the proceeds to the public use of paying the debts of the corporation incurred for public purposes: Commonwealth *v.* Rush, 14 Pa. St. 186, 1850; Commonwealth *v.* Alburger, 1 Whart. 469, *per Sergeant*, J.

Dedication on plat of two lots "for *school purposes*, and on which to erect school houses," is a dedication to a specific use, and the property is inalienable by the incorporated place in which it lies, so as to extinguish the use. And there is no power of alienation without the consent of the dedicator or his representatives, even though the lots, by reason of a railroad and depot near by, have been rendered unsuitable for school houses, and their use for that purpose dangerous: Board *v.* Edson, 18 Ohio St. 221, 1868.

Where lots are granted to *county commissioners* and their successors, in trust for the use of the said county in *fee simple* for the purpose of erecting thereon county buildings, which were erected, the land, on the subsequent removal of the seat of justice and the discontinuance of the original uses, does not revert to the original grantor or his heirs: Seebolt *v.* Shitler, 34 Pa. St. 133, 1859.

"*Market space*," on plat, makes it public, and when exchanged by legislative authority for other property for a "market space," that other, though deeded to the city in fee simple, is held by the city in trust, and cannot be sold on execution in payment of the corporate debts: President, &c. *v.* Indianapolis, 12 Ind. 620.

legislature may doubtless direct and regulate the purposes for which the public may use it.[1] But if a grant be made by a proprietor of a town in laying it out for a specific and limited purpose, as, for example, a public square, the municipality or public acquiring only an easement, it has been decided by the Supreme Court of Iowa that the grantor in such a case retains an interest therein of such a nature that it is not, as against him, within the power of the legislature to authorize its sale by the municipality.[2]

§ 514. By the *civil law* the public have, in land dedicated to public use, the right to the ground itself.[3] But such lands

[1] The streets and public squares of the city of Washington were conveyed by the original proprietors of the lands to trustees, "for the use of the United States forever." It was held that these words conveyed an absolute, unconditional fee simple, and that the original proprietors had, as such, no interest therein, and could not, therefore, object to a sale authorized by an act of Congress, of such portions thereof as were no longer useful for streets and squares: Van Ness *v.* Washington, 4 Pet. (U. S.) 232, 1830.

[2] Warren *v.* Lyons City, 22 Iowa, 351, 1867.

In the County Commissioners *v.* Lathrop, 1872, not yet reported, the Supreme Court of Kansas holds that the legislature so far represents the public that its consent to the alienation of public grounds dedicated under the statute is sufficient if no private rights have intervened. But that individuals purchasing from the town proprietors lots fronting on such public grounds, subsequent to their dedication, and making lasting and valuable improvements thereon, when lots are enhanced in value by their position, and would be made of less value by a change of such grounds from public to private use, have a vested interest in the trust which the legislature cannot destroy: See Chap. XVIII. on Streets, *post.*

Where the public have only an easement, the legislature cannot pass a law vesting so much of a street as may be closed or discontinued in the corporation of a city, as this deprives the owner of his property without due process of law: John and Cherry Streets, 19 Wend. 659. In Connecticut, the public have simply an easement in highways, with the right to use materials thereon, in a reasonable manner, to make or repair them; the adjoining land owner retains the fee and the exclusive right to herbage growing thereon, and the public cannot put their cattle in the highway to graze; and it is expressly held that under such circumstances the legislature cannot, without providing compensation, authorize towns to pass by-laws giving liberty to the inhabitants to depasture their cattle in the public highways: Woodruff *v.* Neal, 28 Conn. 168, 1859. As to extent of legislative power, see *ante,* Chap. IV. *Post,* chapter on Streets.

[3] Renthrop *v.* Bourg, 4 Martin (La.), 97; Doe *v.* Jones, 11 Ala. 63, 83.

form no part of the public domain or crown lands, and the king or sovereign cannot alien them otherwise than by exercise of the right of eminent domain, although he may authorize certain erections thereon.[1] And the doctrine has been declared by the Supreme Court of Louisiana, that where *public places* have been destined or created by the sovereign power, or with its consent, this power may authorize the municipal corporation interested in such places to alien or to change their use or destination whenever the public interest requires it, and that the rights of the owners of property in the vicinity are subordinate to this paramount right of the legislature.[2]

[1] New Orleans *v.* United States, 10 Pet. 661, 725, 735, where *McLean*, J., examines very fully the laws of France and Spain in respect to dedications to public use: 3 Kent Com. 451, and note.

[2] Mayor, &c. *v.* Hopkins, 13 La. 326; Mayor, &c. *v.* Leverich, *ib.* 332; Delabigarre *v.* Municipality, 3 La. An. 230. It was decided, both by the state court (Mayor, &c. *v.* Hopkins, *supra*, and see De Armas *v.* Mayor, *et al.* 5 La. 132) and by the Supreme Court of the United States, that the public space, or *quay*, in front of Old Levee street and the river, in the city of New Orleans, was public property, *hors de commerce* (New Orleans *v.* United States, 10 Pet. 662) and did not pass to the United States under the treaty of cession of the province of Louisiana. Pending the controversy between the United States and the city of New Orleans as to the ownership of this property, the parties litigant agreed that it should be laid out into lots and sold, and the proceeds be held subject to the final decision of the court. After judgment was rendered in favor of the city of New Orleans, the legislature of Louisiana passed an act sanctioning the sale of this public property, and the question arose whether the legislature had this power. The Supreme Court of Louisiana held that the legislature possessed this right, laying down the principle that the sovereign power of the state had the right to change the destination of public places whenever it deemed the interest of the public required it, and that the right of the adjacent lot proprietors was necessarily subordinate to the paramount power of the legislature: Mayor, &c. *v.* Hopkins, 13 La. 326; Same *v.* Leverich, *ib.* 332.

Upon the subject of the power of a municipal corporation *to alien public places* with the consent of the sovereign power of the state, see opinion of *McLean*, J., in New Orleans *v.* United States, 10 Pet. 662, 720. See, also, Hebert *v.* Le Valle, 27 Ill. 448; Bell *v.* Railroad Company, 25 Pa. St. 161; S. C. dissent of *Black*, C. J., 1 Grant Cas. 105, 1854; Warren *v.* Lyons City, 22 Iowa, 351, 1867; Philadelphia, &c. *v.* Railroad Company, 6 Whart. 26; County Commissioners *v.* Lathrop, MSS. Supreme Court, Kansas, 1872; Hart *v.* Burnett, 15 Cal. 580; Payne *v.* Treadwell, 16 Cal. 222; distinguished by *Field*, C. J., in Grogan *v.* San Francisco, 18 Cal. 590, 614.

Legislature may authorize sale of "commons:" Woodson *v.* Skinner, 22 Mo. 13, 1855; Carondelet *v.* McPherson, 20 Mo. 192; Swartz *v.* Page, 13 Mo.

Reverter.— Misuser.— Remedy.

§ 515. Property dedicated to public use, or to a particular use, does not revert to the original owner except where the execution of the use becomes impossible. If the dedicated property be appropriated to an unauthorized use, equity will cause the trust to be observed or the obstructions removed.[1]

610; Les Bois *v.* Bramell, 4 How. (U. S.) 449, 458. See *ante*, Chap. IV., as to extent of legislative power over corporations and their property. The boundaries of the power, if indeed it has any limits, are not easily defined. See, also, chapter on Corporate Property, *ante; post*, chapter on Streets.

[1] *Per McLean*, J., Barclay *v.* Howell's Lessee, 6 Pet. 498, 507, 1832; Williams *v.* The Church, 1 Ohio St. 478, 1853; Webb *v.* Moler, 8 Ohio, 552; Price *v.* Thompson, 48 Mo. 363; Warren *v.* Lyons City, 22 Iowa, 351, 1867, *per Wright*, J.; Price *v.* M. E. Church, 4 Ohio, 514; Brown *v.* Manning, 6 Ohio, 298; Le Clerq *v.* Gallipolis, 7 Ohio, pt. 1, 217; Board *v.* Edson, 18 Ohio St. 221, 1868; Harris *v.* Elliott, 10 Pet. 25; County *v.* Newport, 12 B. Mon. 538; Augusta *v.* Perkins, 8 B. Mon. 207.

Conveyance to municipality on condition that the property be used for a specific purpose: French *v.* Quincy, 3 Allen, 9. As to remedy, see chapter on Streets, *post*.

CHAPTER XVIII.

Streets.

§ 516. Municipal corporations in this country sustain most important relations to *streets and highways within their limits.* By statute or charter they are usually authorized to open, establish, alter, and vacate streets. Land may be dedicated for streets and ways, as we have elsewhere shown. The authorities of these corporations are usually invested with the capacity to acquire property for streets for the public use and convenience, by the exercise of the power of eminent domain. Streets, when dedicated and accepted by the corporation, or acquired by purchase or otherwise, are usually placed under the control of the corporation with power to improve, grade, pave, regulate, &c. In some of the states there are statutes providing that the fee in the streets shall be in the municipality in trust for the public, while in other states the fee is considered to be in the adjoining proprietor, and an easement only in the public. The right of municipalities to acquire public streets by dedication,[1] and the power to condemn private property for this purpose by the exercise of the delegated right of eminent domain, have been elsewhere considered,[2] and the liability of municipal corporations in respect to defects and want of repair of the public streets within their limits, will be reserved for treatment in another place.[3]

§ 517. The subject of *Streets* will be considered in this place under the following heads:—

1. *Legislative Control over Streets, and their Uses;* and herein of *obstructions* and *the remedy* of the public *by indictment and in equity;* the remedy *of the adjoining proprietors and others*, including the municipal corporation; and *the effect of adverse possession*, and the operation of *statutes of limitation*—Secs. 518–533.

[1] *Ante*, Chap. XVII. Sec. 489, *et seq.*

[2] *Ante*, Chap. XVI. Sec. 452, *et seq.*

[3] *Post*, Chap. XXIII., on Actions.

2. The Establishment and Control of *Ordinary Roads* and Ways within Corporate Limits—Secs. 534–537.

3. *Delegated Power of Municipal Corporations over Streets, and their Uses;* and herein of the power *to grade* and *improve streets;* and to authorize them to be used for other purposes than mere travel, such as public *sewers and cisterns*, for *gas* and *water pipes*, *telegraph poles*, for common *railroads* and *horse railways;* also, their powers and duties as to *bridges* within their limits—Secs. 538–580.

4. *Limitations on the Right to Free Transit and Use of Streets* —Secs. 581–585.

Legislative Control over Streets, and their Uses — Its Extent — Legalization of Obstructions.

§ 518. Public streets, squares, and commons, unless there be some special restriction when dedicated or acquired, are for the *public* use, and the use is none the less for the *public at large*, as distinguished from the municipality, because they are situate within the limits of the latter, and because the legislature may have given the supervision and control of them to the local authorities. The legislature of the state represents the public at large, and has full and paramount authority over all public ways and public places. "To the commonwealth here," says Chief Justice *Gibson*, "as to the king in England, belongs the franchise of every highway as a trustee for the public; and streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, railroads, canals, or public roads, laid out by the authority of the quarter sessions." [1]

[1] *Per Gibson*, C. J., O'Connor *v.* Pittsburg, 18 Pa. St. 187, 189, 1851. See, further, as to legislative power over public streets and their uses, Trenton Railroad Case, 6 Whart. 25; Commissioners *v.* Gas Company, 12 Pa. St. 318; Stuber's Road, 28 Pa. St. 199; Stormfeltz *v.* Turnpike Company, 13 Pa. St. 555, 1860; Gray *v.* Iowa Land Company, 26 Iowa, 387, 1868; distinguished from Warren *v.* Lyons City, 22 Iowa, 351; Railroad Company *v.* Brownell, 24 N. Y. 345, 1862; Reading *v.* Commonwealth, 11 Pa. St. 196; Woodruff *v.* Neal, 28 Conn. 168, 1859; Jones River Co. *v.* Anderson, 12 Leigh (Va.), 276; Woodson *v.* Skinner (sale of commons), 22 Mo. 13, 1855; Bailey *v.* Railroad Company, 4 Harring. (Del.) 389, 1846; Mercer *v.* Railroad Company, 36 Pa. St. 99, 1859; Clinton *v.* Railroad Company, 24 Iowa, 455; Railroad Company

§ 519. By virtue of its authority over public ways, the legislature may authorize acts to be done upon them or legalize obstructions therein, which would otherwise be deemed nuisances. As familiar instances of this, may be mentioned the authority to railway, water, telegraph, and gas companies, to use or occupy streets and highways for their respective purposes. And it may be here observed, that whatever the legislature may authorize to be done is of course lawful, and of such acts, done pursuant to the authority given, it cannot be predicated that they are nuisances; if they were such without, they cease to be nuisances when having the sanction of, a valid statute.[1] As respects the public or municipalities, there is no limit upon the power of the legislature as to the uses to which streets may be devoted. What limitations exist upon the power as respects the original proprietor of property dedicated to the public use, or the adjoining owner or others, is a subject which is elsewhere considered. Statutes legitimating acts and obstructions upon the highways which would otherwise be nuisances are strictly construed, and must be closely pursued, and the authority given must be exercised with proper care.[2] The legislature, instead of exercising this authority directly, may authorize it to be exercised by local or municipal authorities.[3] An act of the legislature legalizing, for the time being, encroachments on the public streets, may be repealed at pleasure—being a mere revocable license—unless something was done or suffered in consideration of the act so as to invest it with the qualities of a contract.[4]

v. Leavenworth, 1 Dillon C. C. R. 393, 1871; Litchfield *v.* Vernon, 41 N. Y. 123, 1869; Metropolitan Board of Health *v.* Heiser, 37 N. Y. 661, 672; Railroad Company *v.* Philadelphia, 47 Pa. St. 314; *Ib.* 329.

[1] Same authorities. Angell on Highways, Sec. 237; Baptist Church *v.* Railroad Company, 6 Barb. 213; Clinton *v.* Railroad Company, 24 Iowa, 455.

[2] Angell on Highways, Sec. 237; Hughes *v.* Railroad Company, 2 Rh. Is. 493; Turnpike Company *v.* Railroad Company, 2 Harr. (N. J.) 314. In virtue of its authority over highways and over streets, which are, in effect, highways, the legislature may establish a *turnpike gate in the streets* of a city. But as such a privilege would embarrass public trade and convenience, the intention of the legislature must be plainly expressed: Stormfeltz *v.* Turnpike Company, 13 Pa. St. 555, 1850.

[3] *Infra*, Secs. 538–578.

[4] Reading *v.* Commonwealth, 11 Pa. St. 196, 1849; Detroit *v.* Plank Road Company, 12 Mich. 333.

§ 520. *Obstruction — Remedy of Public by Indictment and in Equity.*— The principle that streets and public places belong to the general, rather than the local, public, is one of great importance, and has been sometimes overlooked by the courts. Because they are public, whether the technical fee be in the adjoining owner, in the original proprietor, or in the municipality in trust for the public use, any unauthorized obstruction of the public enjoyment is an indictable nuisance.[1] And the proper officer of the commonwealth may proceed, in the name of the public, by bill in equity, for an injunction or relief, or by other appropriate action or proceedings, to vindicate the

[1] State *v.* Atkinson, 24 Vt. 448, 1852; State *v.* Wilkinson, 2 Vt. 480; Commonwealth *v.* Rush, 14 Pa. St. 186, 1850; Heckerman *v.* Hummel, 19 Pa. St. 64, 1852; Mayor *v.* Gravier, 5 Mart. (La.) N. S. 662; Herbert *v.* Benson, 2 La. An. 770, 1847; Reading *v.* Commonwealth, 1 Jones (Pa.), 196; Runyon *v.* Bordine, 2 Green (N. J.), 472, 1834; Smith *v.* State, 3 Zabr. (N. J.) 712; S. C. *ib.* 130, 1852; Davis *v.* Bangor, 42 Maine; 522; State *v.* Cincinnati Gas Company, 18 Ohio St. 268, 1868; People *v.* Jackson, 7 Mich. 432; People *v.* Carpenter, 2 Doug. (Mich.) 273; Attorney General *v.* Heishon, 18 N. J. Eq. 410, 1867.

A railroad company is indictable for a nuisance, if, without authority, it erects and continues a building in a public highway or street: State *v.* Railroad Company, 3 Zabr. (N. J.) 360, 1852; Milhau *v.* Sharp, 27 N. Y. 611, 625. Where a private person takes possession of a public common or square, or encloses it, or otherwise wholly excludes the public, such act is *ipso facto* a nuisance, and the court should so charge the jury as a matter of law. And it is no defence that the public inconvenience was more than counterbalanced by the public benefit: State *v.* Woodward (indictment for enclosing public common), 23 Vt. 92, 1850; State *v.* Atkinson, 24 *ib.* 448. Rex *v.* Ward, 31 Eng. Com. Law, 180; 4 Ad. & El. 384, settled and put at rest this principle in England. A public common may, in such case, be described as a public highway: 2 Chitty Crim. Law, 389; State *v.* Atkinson, 24 Vt. 448.

Where a defendant is indicted and convicted for erecting a building which encroaches upon a public street, *the proper judgment* is that the nuisance be abated, and that the defendant pay a fine: Smith *v.* State, 3 Zabr. (N. J.) 712, 1852. "This judgment," said the learned reporter, who was one of the counsel in the case, "is according to the old and well settled authorities (*citing them*). The form of entry, framed from *Rastell's Entries*, 441, was as follows: 'Therefore, it is considered, that the nuisance aforesaid be wholly removed and abated, and that the walls, erections, and buildings, abovementioned, be taken away and removed, and that the aforesaid common and public highway be opened to its right and lawful width, as it was until the erection of said nuisance, at the proper costs and expenses of the said defendant; and that he do pay a fine of five dollars,' &c:" State *v.* Railroad Company, 3 Zabr. 360.

rights of the public against encroachment or denial by individuals.[1] So where, by its charter or constituent act, a municipality has the usual control and supervision of its streets and public places, it may, in its corporate name, institute judicial proceedings to prevent or remove obstructions thereon.[2]

§ 521. *Obstructions — Liability of Author of Obstruction — Remedy.*— The king cannot license the erection or commission of a nuisance;[3] nor in this country can a municipal corporation do so by virtue of any implied or general powers. A building, or other structure of a like nature, erected upon a street without the sanction of the legislature, is a nuisance, and the local corporate authorities of a place cannot give a valid permission thus to occupy streets without express power to this end conferred upon them by charter or statute.[4] The usual powers to

[1] People *v.* Vanderbilt, 26 N. Y. 287; Same *v.* Same, 28 *ib.* 396; State *v.* Mobile, 5 Port. (Ala.) 279, 1837; Moyamensing Com. *v.* Long, 1 Par. (Pa.) 145; Pittsburg *v.* Scott, 1 Barr (Pa.), 309; Commonwealth *v.* Rush, 14 Pa. St. 186, 1850; Heckerman *v.* Hummel, 19 *ib.* 64, 1852; Columbus *v.* Jacques, 30 Geo. 506. If fact of encroachment is disputed and doubtful, it should be settled at law; if the bill be retained, an issue may be directed to try the fact: Attorney General *v.* Heishon, 18 N. J. Eq. 410, 1867.

[2] Pittsburg *v.* Scott, 1 Barr (Pa.), 309; Mankato *v.* Willard, 13 Minn. 13; Winona *v.* Huff, 11 Minn. 119; Dummer *v.* Jersey City, 1 Spencer (N. J.), 86, 1843; Herbert *v.* Benson, 2 La. An. 770; Barclay *v.* Howell's Lessee, 6 Pet. 507; Watertown *v.* Cowen, 4 Paige, 510; Dubuque *v.* Maloney, 9 Iowa, 450, 460, *per Stockton*, J., *arguendo.*

Right of corporation to file bill to restrain execution sale of lots and squares dedicated to educational, religious, and public uses, affirmed by a majority of the court in Cox *v.* Griffin, 18 Geo. 728, 1855. See M. E. Church *v.* Hoboken, 33 N. J. (Law) 13, 1868. It has been held in Louisiana that a municipal corporation, without the institution of any judicial proceedings, may pull down and remove houses and obstructions in the public streets, and is not liable to the owner therefor: Daublin *v.* Mayor, &c. 1 Martin (La.), O. S. 184; N. S. 100. And see Herbert *v.* Benson, 2 La. An. 770, 1847.

[3] Viner Abr. *Nuisance*, F.

[4] Flemingsburg *v.* Wilson, 1 Bush (Ky.), 203; Attorney General *v.* Heishon, 18 N. J. Eq. 410, 1867; Stetson *v.* Faxon, 19 Pick. 147, 1837; Commonwealth *v.* Rush, 14 Pa. St. 186, 1850; State *v.* Railroad Company, 3 Zabr. 360, 1852; Columbus *v.* Jacques, 30 Geo. 506; State *v.* Mobile, 5 Port. (Ala.) 279.

Any *continuous obstruction* of a public highway or street, *not authorized* by competent legal authority, is a public nuisance: *Per Denio*, C. J., in Davis *v.* Mayor, &c. of New York, 506, 1856—the horse railway case relating to Broadway.

regulate and control streets has even been held not to authorize the municipal authorities to allow them to be encroached upon by the adjoining owner, by erections made for his exclusive use and advantage, such as *porches* extending into the streets, or *flights of stairs* leading from the ground to the

The erection of a *market house* in the center of a public street, rendering, as it does, the highway less commodious, is a nuisance, which may be prevented by a bill in equity: State *v.* Mobile, 5 Port. (Ala.) 279, 1837; S. P. Columbus *v.* Jacques, 30 Geo. 506, 1860; Ketchum *v.* Buffalo, 14 N. Y. 374, *per Wright*, J. *Ante*, Sec. 316, p. 324.

A purpresture or permanent encroachment by the adjoining owner is in law, a nuisance, and the public have a remedy by indictment or in equity: Smith *v.* State, 3 Zabr. (N. J.) 712; *Ib.* 130; Moyamensing Com. *v.* Long, 1 Par. (Pa.) 145; State *v.* Railroad Company, 3 Zabr. 360; Attorney General *v.* Heishon, 18 N. J. Eq. 410.

Openings made and left in streets or sidewalks are nuisances: Beatty *v.* Gilmore, 16 Pa. St. 463; Runyon *v.* Bordine, 2 Green (N. J.), 472, 1834; Scammon *v.* Chicago, 25 Ill. 424. *Infra*, Secs. 553, 554; *post*, Chap. XXIII.

It is a public nuisance, and indictable at common law, to erect a stall for the public sale of articles on the street or pavement, without authority from the municipal corporation; the owner of the adjoining premises can confer no such authority: Commonwealth *v.* Wentworth, Bright. (Pa.) 318.

Respecting nuisances upon streets and highways, Mr. Justice *Appleton* says: "But nuisances may obviously be committed upon a highway by its unlawful use, for which those committing may be liable civilly to such as may suffer therefrom special damage, and be punished criminally, as thereby annoying the traveling public generally." Where the charter of a town gives it power to abate nuisances, the use of this term refers to the general law to determine what acts or things are such. In relation to streets and highways, "the carrying an unreasonable weight with an unusual number of horses (Rex *v.* Egerly, 3 Salk. 183); the driving a carriage through crowded streets with dangerous speed (United States *v.* Hart, Pet. [Circuit Court] 390); the selling by a constable, at auction, in the public thoroughfares (Commonwealth *v.* Millman, 13 Serg. & Rawle, 408); the placing at a window the effigy of a bishop, labelled, 'Spiritual Broker,' thereby drawing crowds to the shop (Rex *v.* Carlisle, 3 Carr. & P. 636); the keeping coaches at a stand in the street, awaiting customers (Rex *v.* Cross, 3 Campb. 326—see Davis *v.* City of Bangor, 42 Maine, 522); the loading and unloading of wagons in the street (Rex *v.* Russell, 6 East, 427); the congregating of carts for the reception of slops from the distilleries (People *v.* Cunningham, 1 Denio, 524); the collecting crowds in the streets by using violent and indecent language to those passing in the street, thereby obstructing their free passage (Baker *v.* Commonwealth, 19 Pa. St. 412); have severally been held nuisances, as annoying the whole community, and incommoding and endangering the traveling public:" *Per Appleton*, J., in Davis *v.* Bangor, *supra*.

upper stories of buildings standing on the line of the streets.[1] Any party so erecting or maintaining a nuisance upon a public street, alley, or place, is liable to the *adjoining owner* or other person who suffers *special* damage therefrom.[2]

§ 522. As to the *right to relief in equity*, it may be considered settled, that a party entitled to a right of way over a street may be protected in the enjoyment thereof by restraining the erection of obstructions thereon; but the mere allegation of irreparable mischief from the acts complained of is insufficient; *facts* must be stated to show that the apprehension of injury is well founded.[3] Individual owners of lots adjacent a public square,

[1] People *v.* Carpenter, 2 Doug. (Mich.) 273, 1849. Chief Justice *Whipple*, in this case, denies that such a use of the streets can be authorized by the legislature, since it would destroy the vested rights of property owners under the dedication; but this is an extreme view.

Stetson *v.* Faxon, 19 Pick. 147; Hall *v.* McCaughey, 51 Pa. St. 43.

What adjoining owner must show to maintain *case:* Abbott *v.* Mills, 3 Vt. 521; McLaughlin *v.* Railroad Company, 5 Rich. (South Car.) Law, 583; Bryson *v.* Bordine, 2 Green (N. J.), 472, holding that where a ditch was dug in an alley in front of the plaintiff's lot, trespass on the case was the proper form of action: Heckman *v.* Hummel, 19 Pa. St. 64; Stetson *v.* Faxon, 19 Pick. 147, and see learned opinion of *Putnam*, J., as to what constitutes special or particular damages: Haynes *v.* Thomas, 7 Ind. 38; Black *v.* Railroad Company, 58 Pa. St. 249.

Where the municipal corporation does not own an absolute estate, but holds property—as, for example, a public square—in trust for the use of the inhabitants, the right of adjoining lot owners is such that without their consent the legislature cannot authorize the corporation to change the character of the dedication, as, for example, to make a lease of it for ninety-nine years, and to apply the avails to the improvement of the land: Le Clercq *v.* Gallipolis, 7 Ohio, part 1, 218, 1835; Haynes *v.* Thomas, 7 Ind. 38. See *ante*, Chap. XV. on Dedication, Secs. 512–515.

Coman *v.* Strauss (obstructing alley by railroad track), 10 Md. 89, 1856; Wade *v.* Flannigan, 1 Md. 525, 1852; Amelung *v.* Seekamp, 9 Gill & J. 468; Story *v.* Vanderbilt, 26 N. Y. 287; Same *v.* Same, 28 *ib.* 396; Davis *v.* May-Kern. 526; Milhau *v.* Sharp, 27 N. Y. 611, 1863.

The Supreme Court of Illinois holds the strict doctrine that, ordinarily, equity will not entertain jurisdiction of a bill where one citizen claims that another has erected buildings in the public streets, and seeks their abatement as a nuisance. To justify the interposition of equity in such cases, it must appear that the remedy at law is, for some reason, insufficient: Starling *v.* Aurora, 40 Ill. 481, 1866. And such is the view in New Jersey: Hoboken *v.* Railroad Company, 20 N. J. Eq. 435; Railroad Company *v.* Prudden, *ib.* 530, 1869. Compare, Bechtel *v.* Carslake, 3 Stockt. Ch. 500.

the value of which is affected by the dedication, have su[ch] rights and interests that they may maintain a bill in equity [to] enforce the trust or to restrain the appropriation of a pu[blic] square by the original proprietors, or by others, to their p[ri]vate use, or to any use inconsistent with the purpose for wh[ich] it was dedicated.[1]

The author prefers the view taken of this subject, in White *v.* Flannig[an], above cited, where the court, having regard to the nature and uses o[f a] street in a populous place, and considering any obstruction which de[nies] the exercise of the right to use it as working irreparable mischief to [the] street *as a street*, sustained the equity jurisdiction; but to entitle the plain[tiff] to an injunction, the facts showing the special injury, the situation of [his] property, &c., should be stated: Elwell *v.* Greenwood, 26 Iowa, 377, 18[70]; Mayor *v.* Franklin, 12 Geo. 239, 1852; People *v.* Vanderhilt, 26 N. Y. [23]; Milhau *v.* Sharp, 27 N. Y. 611, 625, 1863; Cooper *v.* Alden, Harring. [Del.] (Mich.) 72; Railroad Company *v.* Shiels, 33 Geo. 601; Bechtel *v.* Carslak[e], Stockt. Ch. 500.

Several distinct owners cannot join in a bill: Henchman *v.* Railr[oad] Company, 17 N. J. Eq. (2 C. E. Green) 75.

A lot owner has no right to raise or lower the sidewalk or street in fr[ont] of him, when built to an established grade, without the consent of the m[u]nicipal corporation having control of this matter; and an adjoining lot o[w]ner, or, it seems, any other citizen having the right to use the streets, m[ay], under the laws of Louisiana, without proving actual damage, enjoin s[uch] alteration: Dudley *v.* Tilton, 14 La. An. 283, 1859.

[1] Le Clercq *v.* Gallipolis, 7 Ohio, part 1, 218, 1835; approved, Hub[bell] Gazley, 18 Ohio, 18, 27, 1849; Brown *v.* Manning, 6 Ohio, 298, 305, 18[34]. These cases, distinguished from Smith *v.* Hueston, *ib.* 101, in which it w[as] ruled that individual lot owners around a square conveyed to the coun[ty] for "the use of public county buildings," including a court house, have n[o] such special interest as will enable them to maintain a bill to enjoin [the] county authorities from leasing portions of the square to individuals, [the] court saying: "If the rights of the county are violated or threatened, r[e]dress must be sought in the name of the county or its acknowledg[ed] agents." See Chapman *v.* Gordon, 29 Geo. 250; Indianapolis *v.* Cro[ss], Ind. 9; Haynes *v.* Thomas, 7 Ind. 38; Rowan *v.* Portland, 8 B. Mon. [Ky.]; Cook *v.* Burlington, 30 Iowa, 94, 1870; Rutherford *v.* Taylor, 38 Mo. 315.

"It has been so often and uniformly held by the Supreme Court of Lo[u]isiana, that public places within the limits of a corporation cannot be [ap]propriated to private use, and that individual corporators, as well as [the] officers of the corporation [and the corporation in its own name], have [the] right to prevent such appropriation and to sue for the demolition and re[m]oval of buildings erected on them by individuals, that the question [is] no longer be considered an open one:" *Per Rost*, J. Herbert *v.* Benson, La. An. 770, 1847. In this case the court sustained the action of the plai[n]tiff seeking to abate as a nuisance a warehouse erected by the defend[ant]

§ 523. *Obstruction — Remedy of Corporation — Ejectment.*— A municipal corporation entitled to the possession and control of streets and public places, may, in *its corporate name*, recover the same *in ejectment*. Where it possesses the fee, although in trust for public uses, there are no technical obstacles in the way of maintaining such an action against the adjoining proprietor or whoever may wrongfully intrude upon, occupy, or detain the property. But where the adjoining proprietor retains the fee, the courts have overcome the technical difficulty by regarding the right to the possession, use, and control of the property by the municipality as a legal, and not a mere equitable, right.[1]

on the bank of a river within the corporate limits and in front of the plaintiff's house. Mayor, &c. *v.* Gravier, 5 Mart. (La.) N. S. 662, also holds that any inhabitant has this right. It has been held that no one has a right to occupy the street in front of another's house to carry on a trade or business, and the adjoining owner may, if necessary, use force to remove one who so occupies the street; therefore, where a cabman refused to drive away his cab from in front of a hotel, and was removed by a policeman at the request of the owner of the hotel, the policeman was not guilty of an assault: Vandersmith's Case, 10 Pa. Law J. 523.

As to rights of *adjoining owner:* Nelson *v.* Godfrey, 12 Ill. 22, 23; Indianapolis *v.* Croas, 7 Ind. 9; *Ib.* 38; Milhau *v.* Sharp, 27 N. Y. 611; Cooper *v.* Alden, Harring. Ch. (Mich.) 72; Alden *v.* Pinney, 12 Fla. 348; Price *v.* Thompson, 48 Mo. 363.

In Kansas it is held, that the mere fact that private lots fronting upon public grounds are thereby increased in value, does not create a trust therein which the owners of such lots can enforce in equity. But that where the owners of lands dedicate a portion to public uses as parks, or otherwise, and after such dedication sell and convey lots in the remaining portion, fronting on such public grounds, to others, who erect lasting and valuable improvemens thereon, a trust is created therein which may be enforced in equity by those lot owners: County Commissioners *v.* Lathrop, Supreme Court, Kansas, 1872. *Ante*, Chap. XVII. on Dedication, Sec. 506.

[1] Dummer *v.* Jersey City ("market ground"), 1 Spencer (N. J.), 86, 1843; Winona *v.* Huff ("public square"), 11 Minn. 119, 1866; Klinkener *v.* School District, 1 Jones (Pa.), 444; Hannibal *v.* Draper ("church ground"), 15 Mo. 634, 1852; Commissioners *v.* Boyd ("town commons"), 1 Ire. (Law) 194, 1840; M. E. Church *v.* Hoboken (ejectment by city for public "square"), 33 N. J. Law, 13, 1868. Where a corporation has the legal title to the soil of the commons or public streets, it may maintain ejectment to recover the possession thereof: Savannah *v.* Steamboat Company, R. M. Charlt. (Geo.) 342, 1830. *Law*, J., expressed, *arguendo*, the opinion, that where the public or corporation have an easement only, and not the fee, the remedy for a violation of the right is not by private action, but by public prosecution.

§ 524. Where the *public acquire only the use*, and the fee remains in the original proprietor or abutter, the latter is considered the owner of the soil for all purposes not inconsistent with the public rights, and may maintain actions accordingly. Thus it has been held that he may maintain ejectment against an individual who, without lawful authority, erects a private building upon a public square under a lease from the local authorities, these having no power to authorize such a use. The recovery is, of course, subject to the public easement. It does not fall within the plan of this work to treat at length of the rights of action of the original proprietor or adjoining owner, but they will be found discussed in the cases and authorities cited below. We remark only with respect to streets and public places in cities, that ejectment by the adjoining owner seems to be a singularly inapt remedy for an illegal use or occupation thereof.[1]

[1] Pomeroy *v.* Mills (public square), 3 Vt. 279, 1830; Bolling *v.* Petersburg, 3 Rand. (Va.) 563, 1825; Warwick *v.* Mayor, 15 Gratt. (Va.) 528, 1860; Woodruff *v.* Neal, 28 Conn. 168; Cooper *v.* Smith, 9 Serg. & Rawle, 26; Stites *v.* Curtis, 4 Day, 328; Peck *v.* Smith, 1 Conn. 103; 2 Smith Lead. Cas. 184, 185; Angell on Highways, Chap. VII.; Bissell *v.* Railroad Company, 23 N. Y. 61; Sherman *v.* McKeon, 38 N. Y. 266.

In Massachusetts, the adjacent proprietor *owns to the middle of the street*, subject to the public easement: Boston *v.* Richardson, 13 Allen, 152, 153; White *v.* Godfrey, 97 Mass. 472; Bliss *v.* Ball, 99 *ib.* 597; S. P. Bissell *v.* Railroad Company, 23 N. Y. 61; Railroad Company *v.* Elevator Company, 50 Pa. St. 499. And may recover in trespass for destruction of shade trees in the street in front of his lot: Bliss *v.* Ball, 99 Mass. 597, 1868; White *v.* Godfrey, 97 Mass. 472.

In Carpenter *v.* The Oswego, &c. Railroad Company, 24 N. Y. 655, 1861, it was decided that *ejectment* would lie in favor of the owner of the fee in land subject to a public easement; for example, a street, against a party appropriating it to private occupation, such as the laying down therein, by a railroad company, of its track and rails. And it was thus held, notwithstanding it was argued that no judgment which the plaintiff could obtain would give *him* a right to the premises, as the *public* would still be entitled to use them as a street: S. P. Wager *v.* Troy, &c. Railroad Company, 25 N. Y. 526, 1862; Sherman *v.* McKeon, 38 N. Y. 266, 1868. In Cincinnati *v.* White, 6 Pet. 431, it was declared to be the opinion of the court, that where the dedication is complete, and the rights of the public have attached, the owner of the soil, though retaining the naked legal title, cannot recover in ejectment. This reason, given for this ruling, has much force. It is, that ejectment is a possessory action, and that whatever deprives the plaintiff of the right of possession will deprive him of the remedy by ejectment. Exclusive

§ 525. Where, however, the *fee or legal title* passes from the original proprietor, as in some of the states it is declared it shall in statutory dedications, and in land acquired for streets and public purposes by the exercise of the right of eminent domain, such proprietor or the adjoining owner cannot maintain an action for injuries to the soil, or ejectment, but he still has his remedy for any special injury to his rights by the unauthorized action of others.[1]

§ 526. *Ejectment — Effect of Judgment or Decree Against Municipal Corporation.* — It fairly results from the view taken in this chapter of the nature of the rights of the public at large

possession of the land cannot, it was said, consistently with the rights of the public, be delivered to the plaintiff in execution of a judgment of recovery. The doctrine of Lord Mansfield, in Goodtitle *v.* Alker, 1 Burr. 143, "that *ejectment* will lie by the owner of the soil for land which is subject to a passage over it as the king's highway," was regarded by the court, or at least by the judge delivering the opinion, in Cincinnati *v.* White, 6 Pet. 431, 442, as unsound, although it was not denied that trespass would lie, as a recovery in damages would not be inconsistent with the public right. See American note to Dovaston *v.* Payne, 2 Smith Lead. Cases, 185, where this subject is discussed: Redfield *v.* Railroad Company, 25 Barb. 54; Hunter *v.* Sandy Hill, 6 Hill, 407. That *trespass* would lie in such a case is well established: Wager *v.* Troy Railroad Company, *supra*, and authorities cited in Mr. Justice *Sunderland's* opinion, p. 540. See, also, Mahon *v.* New York, &c. Railroad Company, 24 N. Y. 658; Fletcher *v.* Auburn, &c. Railroad Company, 25 Wend. 462, 1841; 21 Wis. 602; 23 N. Y. 61.

Though the party has a remedy at law for the trespass, yet as the trespass is of a continuing nature, he may go into equity, have an injunction to prevent a multiplicity of suits, and recover damages as incidental to this relief: Williams *v.* New York Central Railroad Company, 16 N. Y. 97, 111, 1857.

[1] Canal Trustees *v.* Haven, 11 Ill. 554; Hunter *v.* Middleton, 13 Ill. 50; Moses *v.* Railroad Company, 21 Ill. 522; Protzman *v.* Railroad Company, 9 Ind. 467; Railroad Company *v.* O'Daily, 13 Ind. 353; People *v.* Kerr, 27 N. Y. 188; Shurmeier *v.* Railroad Company, 10 Minn. 82; affirmed, 7 Wall. 272; Cooley, Const. Lim. 556, and see note. The laying off and recording a town plat, or of an addition thereto under, has, under the statute of Iowa, the effect to vest in the corporation the fee simple title to, and exclusive right of, dominion over the streets and alleys thus dedicated to the public use. In such case neither the original proprietor nor his grantees have the right to the subterraneous *disposits of coal* within the limits of such streets, and the corporation may maintain an action against him for coal mined and taken by him from beneath the same: Des Moines *v.* Hall, 24 Iowa, 234, 1868.

in streets and public places, that a *judgment in ejectment* by the proprietor of land against a city corporation where the disputed question was as to the ownership of the soil, does not conclude or affect the right of the public to the easement of a street or public place, since the public is, in these respects, represented by the commonwealth, and such a judgment is *res inter alios acta* as to the public right.[1] In California, the court went even further in protection of the rights of the public, and decided not only that there was no power in the municipality to mortgage property held for the public use, but that a decree of foreclosure of such a mortgage does not estop the public or even the municipality, the decree and mortgage being equally null and ineffectual.[2]

§ 527. *Vacation of Streets.*—The plenary power of the legislature over streets and highways is such that it may, in the absence of special constitutional restriction, vacate or discontinue them, or invest municipal corporations with this authority.[3] A municipal corporation, under the authority conferred

[1] Warwick *v.* Mayo, Mayor, 15 Gratt. (Va.) 528, 1860; Bolling *v.* Peters burg, 3 Rand. (Va.) 563. On the ground, which is hardly tenable, that the municipal authorities, as respects public squares and streets, represent not only the corporation but also the public, Mr. Justice *Rost* was of opinion that a final judgment against a corporation was also a judgment against the public, and conclusive upon individuals: Xiques *v.* Bujac, 7 La. An. 498, 1852, *per Rost*, J. But in the same case, Mr. Justice *Preston* expressed the opinion, which is believed to be the correct one, that a judgment against the right of a city to public property will not bar an individual not a party to the suit, and who is interested in maintaining the dedication.

[2] Branham *v.* San Jose, 24 Cal. 585, 1864.

[3] Gray *v.* Iowa Land Company, 26 Iowa, 387, 1868; Kimball *v.* Kenosha, 4 Wis. 321; Stuber's Road, 28 Pa St. 199; Commissioners *v.* Gas Company, 12 Pa. St. 318; Trenton Railroad Case, 6 Whart. 25; Jersey City *v.* State, 1 Vroom (N. J.), 521; Bailey *v.* Railroad Company, 4 Harring. (Del.) 389, 1846; Henchman *v.* Detroit, 9 Mich. 103. But in Indiana the principle was regarded as sound, that in addition to the public easement, and distinct from it, there exists in favor of the owner of a lot upon the street, and as appurtenant to it, a private right to use the street and to insist that the street shall forever be kept open to its full width. And the court considered the conclusion to follow from this principle, that the legislature cannot, without the consent of the lot owner, or compensating him for the damage, vacate a street, or any part of it, in front of or adjoining the lot: Haynes *v.* Thomas, 7 Ind. 38, 1855; Indianapolis *v.* Croas, *ib.* 9; Tate *v.* Railroad Company, *ib.* 470, 483. But as to this point, *quære.*

in its charter, "to locate and establish streets and alleys, and *vacate* the same," may constitutionally order the vacation of a street; and this power, when exercised with due regard to individual rights, will not be restrained at the instance of a property owner claiming that he is interested in keeping open the streets dedicated to the public.[1]

§ 528. *Prescription and Adverse Possession.— Statute of Limitations.*— Concerning rights and remedies with respect to streets and public places, an interesting topic remains on which the cases are not agreed, and that is, whether the rights of the municipality or of the public may be lost by non-user, or adverse possession. There may be instances where the non-user has continued so long, and private rights have grown up of such a nature as to amount to an *equitable estoppel*, or an estoppel *in pais*, on the public, which the courts will enforce upon principles of justice; but such cases are exceptional in their character, and it would perhaps be going too far to say that the courts have distinctly established such a principle.[2] The state of the law, aside from statutory enactment, can best be exhibited by referring to the leading adjudications.

§ 529. The doctrine is well understood, that to the sovereign power, the maxim, "*nullum tempus occurrit regi*," applies, and that the United States and the several States are not, without express words, bound by statutes of limitation.[3] Although municipal corporations are considered as public agencies, exer-

[1] Gray *v.* Iowa Land Company, 26 Iowa, 387, 1868; distinguished from Warren *v.* Lyons, 22 Iowa, 351. Upon the discontinuance of an easement in a public highway, the freehold, or soil, in general, reverts to the owner of the land: Harris *v.* Elliott, 10 Pet. (U. S.) 25, 1836. As to streets in town: Barclay *v.* Howell's Lessee, 6 Pet. 498, 513, *per McLean*, J. *Ante*, Sec. 515.

[2] Lane *v.* Kennedy, 13 Ohio St. 42, 49, 1861, *per Peck*, J.; 3 Kent Com. 451, note, where Chancellor Kent, noticing the case of New Orleans *v.* United States, 10 Pet. 662, suggests that there may be such non-user by the public, and such adverse claims by the original owner, as may, in time, bar the public, "for in this country," he adds, "time may [by legislation] create a bar to the sovereign's right." De Vaux *v.* Detroit, Harring. Ch. (Mich.) 98.

[3] United States *v.* Hoar, 2 Mason, C. C. R. 314; Johnson *v.* Irwin, 3 Serg. & Rawle (Pa.), 291; Lessee *v.* Saunders, 1 Bay (South Car.), 30; People *v.* Gilbert, 18 Johns. 227; United States *v.* Kirkpatrick, 9 Wheat. (U. S.) 735; Angell on Limitations, 36.

cising, in behalf of the state, public duties, there are many cases which hold that such corporations are not exempt from the operation of limitation statutes, but that such statutes, at least as respects all real and personal actions, run in favor of and against these corporations in the same manner and to the same extent as against natural persons.[1]

[1] Lessee, &c. of Cincinnati *v.* First Presbyterian Church, 8 Ohio, 298, 1838. In this case the question was most thoroughly argued and examined by able lawyers, and no cases precisely in point as to municipal corporations were produced. The doctrine of the text was distinctly decided, and was adhered to and applied in the more recent case of Cincinnati *v.* Evans, 5 Ohio St. 594, 1855. As a result of this doctrine, these cases hold that notorious and uninterrupted possession by a private individual or private corporation under a claim of right of land dedicated to a city for public squares or streets for the period of the statutes of limitations, will bar the city of the claim for its use. In Lane *v.* Kennedy, 13 Ohio St. 42, 1861, the prior cases in that state are noticed, and it was held that a partial encroachment, by a fence, of a surveyed highway, was not, necessarily, adverse to the public, nor inconsistent with the easement of the public, the court, by *Peck*, J., observing that the case was distinguishable from Cincinnati *v.* Evans, 5 Ohio St. 594, and the principle was adopted that where the circumstances surrounding the possession are entirely reconcilable with a continued recognition of the ultimate right of the public, the possession is not adverse. Referring to Cincinnati *v.* Evans, *supra*, in which there was an encroachment of a permanent character on the street, the learned judge just named observed: "That case was, in this view of it, rightly determined; but it might, with equal, if not greater, propriety, have been placed [not upon the statute of limitations, but] upon the ground of an *estoppel in pais*, on the part of the city authorities, the building having been located by the city *surveyor* upon the lines *previously established and built upon*." See Jersey City *v.* State, 1 Vroom (N. J.), 521, 1863; Cross *v.* Morristown, 18 N. J. Eq. 305, 1867; Evans *v.* Erie County, 66 Pa. St. In the same state it has been still more recently decided, that the use, by a gas company, of the streets of a city for twenty years, does not bar an inquiry by the *State* into the rightfulness of the use: State *v.* Cincinnati Gas Company, 18 Ohio St. 268, 1868. See, also, Philadelphia *v.* Railroad Company, 58 Pa. St. 253. On the general subject of the application of the statute of limitations to municipal corporations, see, also, Galveston *v.* Menard, 23 Texas, 349, 408, 1859; Rowan's Executors *v.* Portland, 8 B. Mon. 259; Alves *v.* Henderson, 16 B. Mon., 131, 171, 1855; Dudley *v.* Frankfort, 12 B. Mon. 610, 617; Newport *v.* Taylor, 16 B. Mon. 699, 806; Paine *v.* Commissioners, &c. Wright's Ohio Rep. 417; Kelly's Lessee *v.* Greenfield, 2 Har. & McHen. (Md.) 132, 137; North Hempstead *v.* Hempstead, 2 Wend. (N. Y.) 137. And see Judge *Storer's* argument, 8 Ohio, 304; St. Charles *v.* Powell, 22 Mo. 525, 1856; Armstrong *v.* Dalton, 4 Dev. (North Car.) 568, 1834; Pella *v.* Scholte, 24 Iowa, 283; Bowen *v.* Team, 6 Rich. (South Car.) Law, 298; State *v.* Pettis,

§ 530. It will be seen, on examination, that quite a number of the cases cited in the last note declare that the public may even lose their right to streets and public places by long continued adverse occupation by private individuals. But on the other hand, it has been repeatedly held by the Supreme Court of Pennsylvania, "that the lapse of time furnishes no defence for an encroachment on a public right," such as an obstruction on a street or public square. The view of the court is, in substance, this: Streets and public squares are dedicated or acquired for the *public use*, and not alone for that of the people of the city, the corporation being the mere trustee for the public; that erections by private persons, on property thus dedicated or acquired, cannot be authorized by the original proprietor, nor by the city corporation, and can be authorized only by act of the legislature; that unauthorized obstructions and erections thereon are public nuisances, and may be prosecuted by indictment or other proceedings, on behalf of the public, and that no length of time, unless there be a limit *by statute*, will legalize a public nuisance, or bar the right of the public to proceed by indictment to abate it, and that in the absence of a grant shown from a competent source, no presumption from mere lapse of time can be made to support a nuisance which is an encroachment on the public right. In one case, Mr. Justice *Sergeant* well observes: "These principles pervade the laws of the most enlightened nations, as well as our own code, and are essential to the protection of public rights, which would be gradually frittered away if the want of complaint or prosecution gave the party a right. Individuals may reasonably be held to a limited period to enforce their rights against adverse occupants, because they have an interest sufficient to make them vigilant. But in public rights of property, each individual feels but a slight interest, and rather

7 *ib.* 390; Barnwell *v.* McGrath, 1 McMullen (South Car.), 174; County *v.* Brinthall, 29 Pa. St. 38; Magee *v.* Commonwealth, 46 Pa. St. 358, where the statute of limitations was held not applicable to assessments for local improvements. But see Evans *v.* Erie County, 66 Pa. St. The statute of limitations does not, in any event, begin to run against the inhabitants of a town until they are incorporated, and thus capacitated to sue: Reilly *v.* Chouquette, 18 Mo. 220, 1853.

tolerates even a manifest encroachment than seeks a dispute to set it right." [1]

[1] *Per Sergeant*, J., Commonwealth *v.* Alburger, 1 Whart. (Pa.) 469, 488. See, also, Commonwealth *v.* McDonald (indictment for "actual obstruction," etc.), 16 Serg. & Rawle, 390, 1827; Barter *v.* Commonwealth (ownership of wells in streets), 3 Pa. (Penrose & Watts) 253, 1831. In this case, *Gibson*, C. J., remarks: "The title of the corporation [of Lancaster] to the soil [of the streets] for uses that conduce to the public enjoyment and convenience, is paramount and exclusive; and no *private* occupancy, for whatever time, *and whether adverse or by permission*, can vest a title inconsistent with it. The case of the Commonwealth *v.* McDonald, by which this salutary principle has been conclusively established, is founded in the purest reason, and fortified by the strongest authorities:" *Ib.* 259; Ring *v.* Schoenberger (claim of ownership in public square), 2 Watts (Pa.), 23, 1833. As to title by adverse possession, compare with remarks of *Gibson*, C. J., above quoted: Commonwealth *v.* Alburger (indictment for erecting church in Franklin Square, Philadelphia), 1 Whart. (Pa.) 469, 1836; Penny Pot Landing Case, 16 Pa. St. 79, 94, citing and re-affirming the foregoing cases. Philadelphia *v.* Railroad Company, 58 Pa. St. 253. It is a fair deduction from the foregoing cases, that a prescriptive right to maintain an encroachment upon the public streets or squares cannot be set up as against the public, and that, as against the public, a title by adverse possession cannot be acquired by individuals. As to private rights, the statute of limitations runs, in Pennsylvania, against municipal corporations: Evans *v.* Erie County, 66 Pa. St.

The doctrine that a right to a portion of a public street may be acquired as against the public by prescription or adverse possession, was rejected, and characterized "eminently disastrous to the public interests," by *Whelpley*, J., in Jersey City *v.* Morris Canal Company, 1 Beasl. (N. J.) 547, 561, denying the correctness of Knight *v.* Heaton, 22 Vt. 480, and similar cases, which hold that the enclosure and occupation of land within the limits of a highway for twenty years under a claim of right, makes title in the occupier by prescription as against the public: Smith *v.* State, 3 Zabr. (N. J.) 712, 1852. It was held in Simmons *v.* Cornell, 1 Rh. Is. 519, that no adverse possession and use of a *portion* of a highway by individuals, however long, would give a title as against the state or the public, as the statute of limitation does not run against them, because the adverse claim could never have had a legal commencement. But see Beardslee *v.* French, 7 Conn. 125, where an entire *non-user* for ninety years of the whole way, and an exclusive possession by an individual, was held to extinguish the right of the public. Litchfield *v.* Wilmot, 2 Root, 288. A street was dedicated eighty feet in width, and subsequently, under proceedings void in law, twenty feet were vacated, leaving the street sixty feet wide, to which width only did the municipal authorities work it, and adjacent lot owners improved with reference to its being a sixty feet street. It was the opinion of the chief justice that the city, acting under the mistake of supposing the proceedings to vacate to be binding upon it, was not thereby estopped to insist that the street was eighty feet wide: Jersey City *v.* State, 1 Vroom (N. J.), 521, 1863; Cross *v.* Morristown, 18 N. J. Eq. 305, 1867.

§ 531. In Louisiana, also, it is considered, that streets, levees, commons, or public grounds, &c., are lands which are, *out of commerce*, incapable of being alienated, and must ever remain free to the public. It is, therefore, held, that no silence or length of time can deprive a public corporation of its power over public places; that its inaction may give an occupier an estate at sufferance, but nothing more; and that inasmuch as such property is not susceptible of alienation by the corporation, no prescriptive adverse right thereto can be acquired, since prescription presupposes a title fairly acquired, but not now capable of proof.[1]

§ 532. In Illinois, where the statute of limitations protects an actual possession of lands, under a *bona fide* claim or color of title, for seven years, to the extent and according to the purport of the possessor's paper title, it is held that this statute does not apply to a suit brought by a municipal corporation to recover possession of property which was dedicated to it for the use of the public, since the corporation has no power to *alien* or *dispose* of the property, and hence there could be no paper title to be protected such as the statute contemplated. Whether an adverse possession for twenty years would defeat an action by the corporation, no opinion was given.[2]

[1] New Orleans *v.* Magnon, 4 Martin (La.), 2, 1815, 815; S. P. Mayor, &c. *v.* Maggioli, 4 La. An. 73, 1849; Ingram *v.* Police Jury, 20 La. An. 226, 1868. It may be observed that in neither of these cases did the defendants show a state of facts of which adverse possession could be fairly predicated, or a right or title fairly acquired. See, also, Delabigarre *v.* Second Municipality, 3 La. An. 230, 237. Acts of city authorities, in ignorance of its rights and prejudicial to those rights with respect to streets and commons, are not binding upon the corporation: Lewis *v.* San Antonio (Exidos grant for pasturage, &c.), 7 Texas, 288, 1851; New Orleans *v.* United States, 10 Pet. 734.

As to title against the public, or a municipal corporation, by *adverse possession*, see, further, 1 Domat, 492; Henshaw *v.* Hunting, 1 Gray (Mass.) 203; Jersey City *v.* Morris Canal Company, 1 Beasl. (N. J.) 547; Fox *v.* Hart, 11 Ohio, 414; Rowan's Executors *v.* Portland, 8 B. Mon. 232, 259; Commissioners *v.* Taylor, 2 Bay (South Car.), 282; Galveston *v.* Menard, 23 Texas, 349; Onstott *v.* Murray, 22 Iowa, 457; McFarlane *v.* Kerr, 10 Bosw. (N. Y.) 249; Litchfield *v.* Wilmot, 2 Root (Conn.), 288; State *v.* Pettis, 7 Rich. (South Car.) Law, 390; Bowen *v.* Team, 6 *ib.* 298; Pella *v.* Scholte, 24 Iowa, 283.

[2] Alton *v.* Illinois Transportation Company, 12 Ill. 60; Turney *v.* Chamberlain (as to adverse possession), 15 Ill. 271.

§ 533. Upon consideration, it will, perhaps, appear that the following view is correct: Municipal corporations, as we have seen, have, in some respects, a double character—one public, the other (by way of distinction) private. As respects property not held for public use, as streets, commons, &c., and, as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes, and be affected by them. For example, in an action on contract or for tort, a municipal corporation may plead or have pleaded against it the statute of limitations. But such a corporation does not own and cannot alien public streets or places, and no laches on its part or on that of its officers can defeat the right of the public thereto, yet there may grow up, in consequence, private rights of more persuasive force in the particular case than those of the public. It will, perhaps, be found, that cases will arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public, but if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine, that as respects public rights, municipal corporations are within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an *estoppel in pais* as applicable to such cases, as this leaves the courts to decide the question, not by the mere lapse of time, but by all the circumstances of the case, to hold the public estopped or not, as right and justice may require.

The Establishment and Control of Ordinary Highways and Roads Within Municipal Limits.

§ 534. Throughout the United States, township, county, or other local authorities, have the general control and supervision over the ordinary public highways, while in incorporated towns and cities this power, as respects streets, is usually conferred upon the corporate authorities. When the jurisdiction and power in the one is excluded by the charters of the other, has given rise to nice and difficult questions of construction, depending upon the supposed intention of the legislature to be gathered from the whole course of legislation on the subject in

the particular state, and with reference to the particular municipality. A few illustrations, drawn from actual decisions, may be useful; and first, of cases where it has been held that the municipal authority was exclusive of the authority conferred upon other officers or tribunals by the general statutes.

§ 535. In Tennessee it was held, in an early case, that the County Court had no power to lay off roads through incorporated towns: Because, 1. The act of assembly authorizing them to lay off such *roads* within a county as they shall deem proper, does not literally extend to *streets*. 2. Every town supposes lots and streets, and its erection into a town by the legislature creates a state of private interest distinct from the body of the county, and this should be regulated by the town's-people. 3. The magistrates composing the County Court are from the country, at least most of them, and consequently cannot be expected to know the interest of the corporation, and if they did they might feel inimical to it.[1] So, by statute in Texas, the counties had general authority to keep in repair the public highways therein, and an incorporated town, by its charter, had the right to improve its streets and alleys; and the question arose, whether the county or town authorities had power to keep in repair streets or highways within the corporate limits of the town. The court, to prevent conflict of jurisdiction, held that the town had exclusive control of the streets and highways therein.[2] So it is held, in Indiana, that the general statutes of the state in relation to "public highways," do not apply to the *streets* and *alleys* of an incorporated town or city.[3]

[1] Cowan's Case, 1 Overton (Tenn.), 311, 1808. "A highway is not a street, either technically or in common parlance; so judicially settled:" Indianapolis *v.* Croas, 7 Ind. 9; Lafayette *v.* Jenners, 10 *ib.* 74, 79. But a street is of course a highway, in the sense that it is free for every person to use it for the purpose of travel, conforming, of course, to all proper police regulations, and the right of passage is one which the municipal authorities cannot abridge or deny: Bell *v.* Foutch, 21 Iowa, 119, 131, 1866; Barret *v.* Brooks, *ib.* 144.

[2] State *v.* Jones, 18 Texas, 874, 1857.

[3] Indianapolis *v.* Croas, 7 Ind. 9, 1855. So, in New Jersey, it is held, that the general road acts of the state do not apply to incorporated places having special power to regulate and improve streets: Cross *v.* Morristown, 18 N. J. Eq. 305; State *v.* Morristown, 33 N. J. (Law) 57.

§ 536. On the principle of the foregoing cases, it is held that a general state law, authorizing counties and townships to impose the burden of road labor only on persons between twenty-one and fifty years of age, does not limit the express charter power of a city to impose such burden upon all persons over twenty-one years of age, and hence it may require persons over fifty years of age to perform road labor.[1]

§ 537. On the other hand, power, by charter, conferred upon a city to lay out new highways, and to alter, enlarge, and extend highways within its limits, was held not to divest, by implication or implied repeal, the jurisdiction of the County Court over the same subject given by general statutes.[2] So it is held, in Ohio, that general power being conferred upon the commissioners of the county to lay out and establish roads within the limits of the county, they are thereby authorized, unless their authority is especially restricted in the acts of incorporation, to lay out and establish *county* roads, whose *termi-*

[1] Fox *v.* Rockford, 38 Ill. 451, 1865. See O'Kane *v.* Treat, 25 Ill. 557, as to exemption of cities under charters from road taxes levied by township and county authorities. In general, the jurisdiction of a city or town over its streets is exclusive, as to road labor, of the general laws of the state relating to public or county roads: *Ib.* Ottawa *v.* Walker, 21 Ill. 605.

Road labor may be constitutionally imposed by statute unless the power of the legislature be specially limited: Sawyer *v.* Alton, 3 Scam. (Ill.) 130; Skinner *v.* Hutton, 33 Mo. 244. See chapter on Taxation, *post.* Until the town, the plat of which is recorded, becomes incorporated, the streets are under the control of the county authorities, who cannot enlarge or diminish their width, but may direct how much thereof shall be worked or improved: Waugh *v.* Leech, 28 Ill. 488, 1862. Streets need not be recorded in the *county* records: Townsend *v.* Hoyle, 20 Conn. 1.

Unless authorized by statute, a county cannot use county funds to aid in the construction of *toll bridges*, or to aid a private individual in the construction of a free bridge: Colton *v.* Hanchett, 13 Ill. 615, 1852; Clark *v.* Des Moines, 19 Iowa, 198. In Iowa, counties have been held, under the legislation of that state, to have power to aid in the construction of *free* bridges, erected with the sanction of the proper municipal authorities, for public use, upon public lines of travel, within incorporated towns or cities: Bell *v.* Foutch *et al.* 21 Iowa, 119, 1866; Barrett *v.* Brooks, 21 Iowa, 44.

As to liability in Iowa of *county* for defective bridges *within* city limits: McCullom *v.* Blackhawk County, 21 Iowa, 409.

[2] Norwich *v.* Story, 25 Conn. 44, 1856. Duty of repair held to rest on the *town*, and not the city, the former being made liable by statute and the latter not: Guthrie *v.* New Haven, 31 Conn. 308.

ni are wholly within, or which run through, an incorporated town or city — these corporations, unless expressly exempted, being subject to the operation and control of the general laws of the state.[1]

Municipal Power over Streets, and their Uses.

§ 538. As the highways of a state, including streets in cities, are under the paramount and primary control of the legislature, and as all municipal powers are derived from the legislature, it follows that the authority of municipalities over streets, and the uses to which they may be put, depend entirely upon their charters or legislative enactments applicable to them. It is usual in this country for the legislature to confer upon municipal corporations very extensive powers in respect to streets and public ways within their limits, and the uses to which they may be appropriated. This will be illustrated everywhere throughout the present chapter. The authority to open, care for, regulate, and improve streets, taken in connection with the other powers usually granted, gives to municipal corporations all needed authority to keep the streets free from obstructions, and to prevent improper use, and to ordain

[1] Wells *v.* McLaughlin, 17 Ohio, 99; Butman *v.* Fowler, *ib.* 101, 1848; Swan's Ohio Stat. 796. Municipal charter held not to divest county authorities of their jurisdiction over part of the road lying within the limits of the town; Baldwin *v.* Green, 10 Mo. 410. Under the special act incorporating Bennington, it was held that the trustees of the village had not the exclusive authority to lay out highways within its limits, but that the general law upon the subject was still applicable: Bennington *v.* Smith, 29 Vt. (3 Wms.) 254, 1857.

Further as to power of county or township authorities with respect to roads and highways within the limits of incorporated towns and cities, see Pope *v.* Commissioners, &c. 12 Rich. (South Car.) Law, 407; Sharrett's Road, 8 Barr (Pa.), 89; Railroad *v.* Duquesne, 46 Pa. St. 223; Road Case, 14 Sergeant & Rawle (Pa.), 447; Newville Road Case, 8 Watts (Pa.), 172; Road in Easton, 3 Rawle (Pa.), 195; Road in Milton, 40 Pa. St. 300; Knowles *v.* Muscatine, 20 Iowa, 248; McCullom *v.* Blackhawk County, 21 Iowa, 409.

Extent of municipal control over *turnpike road* constructed in the streets of a city: State *v.* New Brunswick, 1 Vroom (N. J.), 395. See State *v.* Hoboken, *ib.* 225; Quinn *v.* Paterson, 3 Dutch. 35; State *v.* Passaic County, *ib.* 217.

Power over *plank road* in street: State *v.* Jersey City, 2 Dutch. (N. J.) 445; McKay *v.* Plank Road Company, 2 Mich. 138; Detroit *v.* Plank Road Company, 12 Mich. 333. See Regina *v.* Cottle, 3 Eng. Law & Eq. 474.

ordinances to this end.[1] Thus, a city having "the care, supervision, and control of streets, squares, and commons" within its limits, may, by ordinance, prohibit the appropriation of these to private use, such as *sales* by individuals *at auction* thereon, or upon the sidewalks or streets.[2]

[1] Philadelphia *v.* Railroad Company, 58 Pa. St. 253; Commonwealth *v.* Brooks, 99 Mass. 434; Dudley *v.* Frankfort, 12 B. Mon. 610, 617; Mercer *v.* Railroad Company, 36 Pa. St. 99; Railroad Company *v.* Chenoa, 43 Ill. 209; Railroad Company *v.* Galena 40 Ill. 344.

The power to *open* new streets given in a city charter was held to be synonymous with the power to lay out and establish streets, and not merely to limit the authority of the city to opening streets already existing on the plan or plat of the corporation and its additions: Hannibal *v.* Railroad Company, Supreme Court of Missouri, March term, 1872. Under such authority a city may open streets across the track of existing railroads within the city limits. *Ib.*

Power to the common council of a city, by the charter, to adopt ordinances "to prevent the *cumbering* of streets, sidewalks," &c., in view of the distinction recognized in the charter, and which the legislature of Michigan had always made between cumbering and obstructing a public way, and encroaching upon it, was held to refer to impediments to travel placed in the open street, and not to actual enclosures of a portion of the street by fences, or occupation by buildings: Grand Rapids *v.* Hughes, 15 Mich. 54, 1866. Power to a city, by its charter, to regulate the use of streets and alleys, and to prevent and remove obstructions from them, contemplates the preservation of actual ways against nuisances which interfere with their accustomed use, and until they have become actually open, obstructions thereon, under a claim of title apparent on the face of the prosecution, cannot be punished under an ordinance in the municipal tribunal, but the rights of the parties must be determined in the public courts: Jackson *v.* People, 9 Mich. 111, 1860. See, also, Warwick *v.* Mayo, 15 Gratt. 528. A municipal corporation may cause *surveys of streets*, squares, and other public property to be made, and may employ a surveyor or engineer to furnish copies of an original map or a new map of the city or town: People *v.* Flagg, 17 N. Y. (3 Smith), 584, 1858; Randall *v.* Van Vechten, 19 Johns. 60, 1821.

Municipal power to regulate streets and sidewalks includes the power to determine *the width* of each: State *v.* Morristown, 33 N. J. (Law) 57, 1868.

[2] White *v.* Kent, 11 Ohio St. 550, 1860. See, also, Shelton *v.* Mobile, 30 Ala. 540. Power of city to remove nuisances and obstructions on streets at the expense of the party creating them: See, generally, Hawley *v.* Harrall, 19 Conn. 142. As to power of city highway surveyor and street commissioner over sidewalks, see Noyes *v.* Ward, 19 Conn. 250, 270; Clark *v.* McCarthy, 1 Cal. 453. Power to prevent sidewalks from being obstructed by *swine:* Commonwealth *v.* Curtis, 9 Allen, 266. Relation of sidewalk to street: See Index,—Taxation and Assessment. Hart *v.* Brooklyn, 36 Barb. 226. *An awning* erected without municipal consent may be declared an unlawful obstruction of a street: Peduck *v.* Bailey, 12 Gray (Mass.), 161. *Post*, Chap. XXIII.

§ 539. So, authority to erect and keep in repair bridges and streets, confers by implication the power to employ the means necessary to that end, and among these means may be the passage of an ordinance inflicting a fine for *wilful or negligent injuries thereto*. Power thus to protect the public property of the corporation could probably also be derived from the usual authority to regulate the police of the city.[1] The gutters and drains of a city intended to carry off *surface water* can be used by manufacturers and others, only by the consent, express or implied, of the local government; such use is unlawful if it result in a nuisance, and may be prohibited by the municipal authorities.[2]

§ 540. Power to make such ordinances "respecting *streets*, *wagons*, *carts*, *drays*, &c., as to the council shall appear necessary for the *security*, *welfare*, and *convenience* of the city," authorizes an ordinance regulating the weight which wagons and other vehicles employed in the transportation of goods, wares, or produce of any kind, shall carry through the streets of the city. In thus holding, the court admitted that "an ordinance which would operate as a total exclusion of the right of the citizen to pass over the streets of the city with his loaded wagon and team would be unreasonable and void, as against common right; but the ordinance in question merely *regulates* the exercise and enjoyment of the right, and is valid."[3]

§ 541. *Public Nature of Streets.*— Whether the fee of the street be in the municipality in trust for the public use, or in the adjoining proprietor, it is, in either case, of the essence of the street that it is public, and hence, as we shall hereafter show, under the paramount control of the legislature as the representative of the public. Streets do not belong to the city or town within which they are situated, even although acquired

[1] Korah *v.* Ottawa, 32 Ill. 121, 1863. See Hooksett *v.* Amoskeag &c. Company, 44 N, H. 105. As to right of town to maintain case against wrong-doers for injuries to the public highways and bridges; right of street officer to prevent injury to street: Clark *v.* McCarthy, 1 Cal. 453.

[2] Municipality *v.* Gas Light Company, 5 La. An. 439, 1850. *Post*, Chap. XXIII.

[3] Nagle *v.* Augusta, 5 Ga. 546, 1848. Power to require *license* from persons using streets with heavy loads: Gartside *v.* East St. Louis, 43 Ill. 47.

by the exercise of the right of eminent domain, and the damages paid out of the corporation treasury. The authority of municipalities over streets they derive, as they derive all their other powers, from the legislature—from charter or statute.[1] The fundamental idea of a street is not only that it is public, but public for all purposes of free and unobstructed passage, which is its chief and primary, but by no means, sole, use.

§ 542. *Power to Improve and Graduate.*—That the use of the streets for travel may be made safe and convenient, the legislature usually confers upon the municipal authorities the power, in express terms, to *graduate and improve* them, and supplies the means to carry the power into effect by requiring the inhabitants to perform labor upon the streets or to pay specific taxes for that purpose, or taxes that may be so appropriated by the corporation. In another place will be considered more fully the liability of the corporation growing out of this power, in respect to maintaining the streets in a *safe* condition for travel. It will, however, be proper here to notice the nature of the power to grade and improve streets, as it has been judicially ascertained and settled. A leading case on this subject is that of Goszler *v.* Georgetown, decided by the Supreme Court of the United States.[2] By its constituent act, the corporation of Georgetown had "full power to make such by-laws and ordinances for the graduation and levelling of streets as they may judge necessary for the benefit of the town." Pursuant to this authority, the corporation passed an ordinance for the graduation of certain streets, the first section of which appointed commissioners for that purpose. The second section of the ordinance was as follows: "Be it ordained, that the said level and graduation, when signed by the commissioners and returned to the clerk of this corporation, *shall be forever thereafter* considered as the true graduation of the streets so graduated, and be binding upon this corporation, and all other persons whatever, and be *forever* thereafter regarded in making

[1] Barter *v.* Commonwealth, 3 Pa. (Pen. & W.) 253; Commonwealth *v.* Railroad Company, 27 Pa. St. 339; Allegheny *v.* Railroad Company, 26 Pa. St. 355.

[2] Goszler *v.* Georgetown, 6 Wheat. (U. S.) 593, 1821.

improvements upon said streets." The plaintiff made improvements according to this grade, and *afterwards* the corporation passed another ordinance directing the grade to be changed by being lowered, to the plaintiff's injury. The plaintiff's bill for an injunction was dimissed, the court holding: 1. That the power to graduate given by the legislature was not exhausted by its first exercise, but was a continuing one: the power is given to the town to legislate on the subject, to pass as many by-laws relating thereto as the corporation "may judge necessary for the benefit of the town." 2. The second section of the ordinance (above quoted) was not in the nature of a compact, and therefore was not final and irrepealable. In deciding this point, Mr. Chief Justice *Marshall* says: "But it cannot be disguised that a promise is held forth (by the second section of the ordinance) to all who should build on the graduated streets, that the graduation should be unalterable. The court, however, feels great difficulty in saying that this ordinance can operate as a perpetual restraint on the corporation. When a government enters into a contract, there is no doubt of its power to bind itself to any extent not prohibited by its constitution. A corporation can make such contracts only as are allowed by the acts of incorporation. The power of this body to make a contract *which should so operate as to bind its legislative capacities forever thereafter*, and *disable it* from enacting a by-law, which the legislature enables it to enact, may well be questioned. We rather think that the corporation cannot abridge its own legislative power."[1]

§ 543. That the *power to grade and improve streets*, like other legislative powers, is a *continuing one*, unless the contrary be indicated, has been frequently decided in both the national and state courts. It may, therefore, be exercised from time to time, as the wants of the municipal corporation may require. Of the necessity or expediency of its exercise, the governing body of the corporation, and not the courts, are the judges.[2]

[1] Goszler *v.* Georgetown, 6 Wheat. 597. *Ante*, Secs. 60, 61.

[2] Smith *v.* Washington, 20 How. (U. S.) 135; O'Connor *v.* Pittsburg, 18 Pa. St. 187; Macy *v.* Indianapolis, 17 Ind. 267, 1861; Furman Street, 17 Wend. 649; Hoffman *v.* St. Louis, 15 Mo, 651, 1852; Markham *v.* Mayor, 23 Geo. 402, 1857; Gall *v.* Cincinnati, 18 Ohio St. 563; Plum *v.* Canal Company, 2 Stockt. 256. *Contra*, under charter: Oakley *v.* Williamsburgh, 6 Paige, 262; Goodall *v.* Milwaukee, 5 Wis. 32. *Ante*, Sec. 62.

And the law is also settled, as we shall have occasion hereafter more fully to illustrate, that, unless expressly so declared by charter or statute, a municipal corporation is not liable to property owners for the consequential damages necessarily resulting from either establishing a grade or changing an established grade of streets, although improvements were made in conformity with the first grade.[1] If the legislature gives a remedy in such cases, that remedy alone can be pursued.[2]

§ 544. *Municipal control over uses.*—The power of the public, or of the municipal authorities representing by delegated authority the public, over streets is not confined to their use for the sole purpose of travel, but they may be used for many other purposes required by the public convenience. In the author's judgment, the uses to which streets in towns and cities may legitimately be put are greater and more numerous than with respect to ordinary roads or highways in the country. With reference to these, all the public requires is the easement of passage and its incidents, and hence the owner of the soil parts with this use only, retaining the soil, and, by virtue of this ownership, entitled, except for the purposes of repairs, to the earth and the timber and grass growing thereon, and to all minerals, quarries, and springs below the surface; and he may maintain actions against those who obstruct the road or interfere with his rights therein.[3] But with respect to streets in

[1] Same authorities; Taylor *v.* St. Louis, 14 Mo. 20, 1851; Hovey *v.* Mayo, 43 Maine, 322, 1857; Callender *v.* Marsh, 1 Pick. 416; Brown *v.* Lowell, 8 Met. 172; St. Louis *v.* Gurno, 12 Mo. 414, 1849; Hooker *v.* New Haven, &c. Company, 14 Conn. 146; Green *v.* Reading, 9 Watts (Pa.), 382; Mayor, &c. *v.* Randolph, 4 Watts & Serg. (Pa.) 516; Humes *v.* Mayor, &c. 1 Humph. (Tenn.) 403, 1839; Lafayette *v.* Bush, 19 Ind. 326; Creal *v.* Keokuk, 4 G. Greene (Iowa), 47. In Kentucky, the right to change the grade without liability to pay damages is not absolute and unqualified: Louisville *v.* Rolling Mill Company, 3 Bush, 416, 1867. A change of grade is not shown to be illegal by an allegation that it was made "without any necessity therefor," because the council of the city are the judges of the necessity of the change: Macy *v.* Indianapolis, 17 Ind. 267, 1861. See, further, Chap. XXIII. *post.*

[2] Hovey *v.* Mayo, 43 Maine, 322, 332; Andover, &c. *v.* Gould, 6 Mass. 40; Boston *v.* Shaw, 1 Met. 130.

[3] Barclay *v.* Howell's Lessee, 6 Pet. 498, 512, *per McLean*, J.; Bliss *v.* Ball, 99 Mass. 597, 1868; White *v.* Godfrey, 97 Mass. 472; Boston *v.* Richardson, 13 Allen, 152, 153; Stackpole *v.* Healey, 16 Mass. 33; Peck *v.* Smith, 1 Conn.

populous places, the public convenience requires more than the mere right to pass over and upon them. They may need to be graded and brought to a level; and therefore the public or municipal authorities may not only change the surface, but cut down trees, dig up the earth, and may use it in improving the street or elsewhere, and may make *culverts, drains, and sewers* upon or under the surface. Whether the municipal corporation holds the fee of the street or not, the true doctrine is that the municipal authorities may, under the usual powers given them, do all acts appropriate or incidental to the beneficial use of the street by the public, of which, when not done in an improper and negligent manner, the adjoining fee holder cannot complain.[1]

103; Adams *v.* Rivers, 11 Barb. 393; Griffin *v.* Martin, 7 Barb. 298; Jackson *v.* Hathaway, 15 Johns. 447; Webber *v.* Railroad Company, 2 Met. 149; Louisville *v.* Bank, 3 B. Mon. 138, 158. *Ante*, Secs. 492, 496.

In Cincinnati *v.* White, 6 Pet. 431, the Supreme Court observes that "all public dedications must be considered with reference to the use for which they are made; and streets in a town or city may require a more enlarged right over the use of the land, in order to carry into effect the purposes intended, than may be necessary for an appropriation of a highway in the country." This is manifestly true, and that is too narrow a view of the nature of a *street* which holds that the public gets nothing but a mere right of way, and that the adjoining owner retains as against the public every other right; the public must be taken to get every right necessary to the beneficial use and enjoyment of the street, and these rights in the streets of a populous place are much more enlarged and various than with respect to ordinary highways. Some of the cases have overlooked this difference, and applied too strictly the settled rules of the latter, in all their extent, to the former. See, *ante*, Sec. 496.

[1] Boston *v.* Richardson, 13 Allen (Mass.), 146, 159, 1866, *per Gray*, J.; West *v.* Bancroft, 32 Vt. 367, 1859, *per Pierpont*, J.; Barter *v.* Commonwealth, 3 Pa. (Pen. & W.) 253; Kelsey *v.* King, 32 Barb. 410. In a case in Georgia, where it was held that the owner only parted with, and the city only acquired, *a right of way*, it was decided, but, in the author's judgment, erroneously, that stone within the limits of the street, which had to be removed in order to level and make the street passable, belonged to the adjoining owner as part of the soil, and not to the city as the owner of the right of way; and the latter could not, it was further held, use the rock that might result from the process of levelling for macadamizing or other street improvements, and the corporation was enjoined from so doing: Smith *v.* Rome, 19 Geo. 89, 1855. But in Maine it is held that a corporation which, by its charter, has power to repair and grade streets, may make such repairs and do such grading by authorizing others, at their own expense and under the direction of the street commissioner, to take the materials from the street for their own private use: Hovey *v.* Mayo, 43 Maine, 322, 1857.

§ 545. Thus, although an easement only be acquired by the public, the municipal or local authorities may build a reservoir or *cistern in a street*, to retain water with which to sprinkle streets or extinguish fires.[1] In a case in Iowa, occurring in a city where the fee of the soil in the street was in the adjoining proprietor, subject to the public easement, it appeared that the city corporation built a cistern in the street underneath the surface, near the line of the defendant's lot, and that subsequently the defendant erected a building on his lot on the line of the street, and in excavating for his cellar and foundation wall, and in taking the earth from under the sidewalk in the street, occasioned the destruction of the cistern, for which an action was brought against him by the city; and it was held that the action could not be maintained, because the fee of the street being in the defendant, subject to the public easement, the city had no right, without his consent, to construct the cistern. The court observe that, "subject to the public easement, the owner of the adjoining lots is the absolute owner of the soil of the streets, and retains his exclusive right in all mines, quarries, springs of water, timber, and earth, for every purpose not inconsistent with the public right of way."[2] So far as this case affirms that a municipal corporation cannot rightfully construct a public cistern, for municipal uses, in a public street, without the consent of the abutter holding the fee, it is directly

Although the fee of the streets of a city may be in the adjoining proprietor, subject to the public easement, yet the city, by virtue of its general authority over streets, may cause *sewers* to be made therein, and the owner is not entitled to have his damages assessed as for a new use or servitude: Cone *v.* Hartford, 28 Conn. 363, 1859. In this case the right of the city to make common sewers under the street was deduced from and regarded as an incident to its express and general authority to make and maintain highways and streets. S. P. Fisher *v.* Harrisburg, 2 Grant Cas. (Pa.) 291, 1854. *Post*, Chap. XIX.

[1] West *v.* Bancroft, 32 Vt. 367, 1859.

[2] Dubuque *v.* Maloney, 9 Iowa, 450, 461, 1859, *per Stockton*, J. In towns and cities platted under the code of Iowa, the lot owners do not hold the fee to the middle of the stret, and have no other interest in the streets except a right of way common to the whole public. Dubuque and Keokuk are exceptions in this respect: Milburn *v.* Cedar Rapids, 12 Iowa, 246; *ib.* 261; Haight *v.* Keokuk, 4 Iowa, 199; Dubuque *v.* Maloney, *supra;* Dubuque *v.* Benson, 23 Iowa, 248; Des Moines *v.* Hall, 24 Iowa, 234. See chapter on Dedication, *ante*, Secs. 492, 496.

opposed to the case from Vermont last cited, and to the sound and necessary principle above laid down, namely, that the city corporation may make every use of a street which reasonably conduces to the public convenience and enjoyment. It will never do to hold that a municipality invested with the control of streets and charged with the duty of preserving the public health, promoting the public convenience, and of making provision to extinguish fires, may not, if it deems it expedient, construct a subterranean reservoir or sewer in the middle of a street without the assent of the opposite lot owners.[1]

§ 546. In Great Britain express legislative sanction is necessary to warrant the laying down of *gas pipes* in the public highways;[2] and so in this country it is also considered that the right to the use of the public streets of a city by a gas company for the purpose of laying down its pipes, is a franchise which can be granted only by the legislature, or some local or municipal authority empowered to confer it.[3]

§ 547. A general grant of power in the charter of a city to cause it to be lighted with gas, while it carries with it, by implication, all such powers as are clearly necessary for the proper and convenient exercise of the authority expressly conferred, does not authorize the city council to grant to any person or corporation an *exclusive* right to use the streets of the

[1] In Glasby *v.* Morris, 18 N. J. Eq. 72, 1866, it seems to be the opinion of Chancellor *Zabriskie*, although the point is not much examined, that where the adjoining proprietors own the fee, a municipal corporation cannot construct a sewer in a public street without an express grant; and he held that in such case the municipal corporation as against the adjoining owner's consent could not authorize a private person to build a subterranean drain in the street. *Post*, Chap. XIX.

[2] Regina *v.* Sheffield Gas Company, 22 Eng. Law and Eq. 518; Galbreath *v.* Armour, 4 Bell, App. Cas. 374; Meen *v.* Gas Company, 2 El. & El. 651; Queen *v.* Charlesworth, 16 Queen's B. 1012; Regina *v.* Train, 9 Cox, Cr. Cas. 180; Boston *v.* Richardson, 13 Allen, 146, 160, by *Gray*, J.

[3] State *v.* Cincinnati Gas Company, 18 Ohio St. 262, 1868. As to power of municipalities to grant permission to lay down *gas pipes* in the streets, see, also, Milhau *v.* Sharp, 15 Barb. 210, *per Edwards*, P. J.; Smith *v.* Metropolitan Gas Light Company, 12 How. Pr. Rep. 187 (Supreme Court, Special term, 1855); Norwich Gas Company *v.* Norwich City Gas Company, 25 Conn. 19, 1856; Smith *v.* Metropolitan Gas Company, 12 How. Pr. 187; People *v.* Benson, 30 Barb. 24.

city for the purpose of laying down gas pipes for a term of years, and thereafter, until the works shall be purchased from the grantee by the city. The court admitted that the power to light the city would authorize the council to contract for gas, and to grant the contracting party the use of the streets, but denied its authority to make such use exclusive for a determinate future period.[1]

§ 548. In the Norwich Gas Light Company *v.* The Norwich City Gas Company, the plaintiffs claimed to have the *exclusive* right to the use of the streets and public places of the city of Norwich for the purpose of *laying down gas pipes* and distributing gas therein, and sought an injunction to restrain the defendant, a rival company, from using the streets for a similar purpose. Plaintiff's claim to an exclusive right to the use of the streets was based upon *an act of the city council*, in terms, giving such exclusive privilege. It appeared that the city did not own the soil or fee of the streets, but that this was in the adjoining proprietor, as in case of ordinary highways, subject to the public right of way, and the right of the city to regulate their use, by making by-laws "relative to the streets and highways of the city," "relative to public lights and lamps," &c. The court decided that while the act of the city council was a license which would protect the plaintiffs from a prosecution for a public nuisance for digging up the streets in order to lay down their pipes, it was inoperative (from want of power in the city) to confer upon them an exclusive right to the use of the streets for this purpose.[2]

§ 549. The plaintiff's claim to an exclusive use of the streets was further based upon *an act of the legislature*, which gave them a right (but did not oblige them to exercise it), to use the streets of the city of Norwich to lay down gas pipes, &c., which right "was declared to be exclusive against any and all persons or corporations," &c., with an exception not material to be noticed. When this act was passed, the defendant's works were far ad-

[1] State *v.* Cincinnati Gas Company, 18 Ohio St. 262, 1868.

[2] Norwich Gas Light Company *v.* Norwich City Gas Company, 25 Conn. 19, 1856.

vanced. The court were of the opinion that the act gave the plaintiffs *no interest in the streets*, and that they could only sustain their bill for an injunction upon the idea that they have an interest in the street that is being interfered with, or threatened to be, by the defendants. The court were further of the opinion, and so held, that the act giving the plaintiffs the exclusive use of the streets was a restriction upon the free manufacture and sale of gas, was a monopoly, and unconstitutional and void. The court distinguished this from the grants of ferry and bridge franchises which are founded upon an adequate consideration, in the obligation to accommodate the public, keep in repair, &c. But, remarks the court, "The grant to the plaintiffs appears to have been made without any consideration whatever for it. The plaintiffs are under no obligation to make gas, or suffer the gas they make to be used."[1] "As there was no consideration, public or private, reserved for the grant, and as the business of manufacturing and selling gas is an ordinary business, like the manufacture of leather, or any other article of trade, in respect to which the government has no exclusive prerogative, we think, that so far as the restriction of other persons than the plaintiffs from using the streets for the purpose of distributing gas by the means of pipes can be fairly viewed as intended to operate as a restriction upon its free manufacture and sale, it comes directly within the definition and description of a monopoly; and although we have no direct constitutional provision against a monopoly, yet the whole theory of a free government is opposed to such grants, and it does not require even the aid which may be derived from the bill of rights, which declares 'that no man or set of men are entitled to exclusive public emoluments or privileges from the community,' to render them void."

§ 550. With reference to this decision, it may be remarked, that in order to induce the investment of capital in such enterprises, it is quite usual for the legislature, or city council by

[1] A gas company is not, upon the general principles of the law, bound, in the absence of an express statute or contract, to furnish gas to all buildings on the lines of their main pipes, upon being tendered the fixed price, or a reasonable compensation: Patterson Gas Light Company *v.* Brady, 3 Dutch. (N. J.) 245, 1858.

legislative authority, to grant exclusive privileges for a limited time. Whether the principles of this decision would be extended to such cases, or to cases where a consideration was reserved for the grant, or whether, without regard to these circumstances, the restriction on the power of the legislature therein declared will be followed elsewhere, are questions which as yet remain to be settled. However it may be as respects the power of the legislature to make the grant *exclusive*, no such power, it is clear, can be exercised by a municipal council, unless it be plainly conferred by express words, or by necessary, or at least, reasonable, implication.[1]

§ 551. *Water Pipes.*—The use of streets for the purpose of laying down *water pipes* stands upon the same principles as their use for sewers and gas pipes. Where the charter gives to the city, in terms, the power to supply, or authorize the inhabitants to be supplied with water, the municipal council may use, or, as an incidental power, may permit the contractor to use, the streets for this purpose, and the adjoining feeholder is not entitled to compensation as for a new servitude, for it is not such, but only a proper or necessary use incident to a street in a populous place.[2]

§ 552. *Telegraph Poles.*—Legislative sanction directly given, or mediately conferred through proper municipal action, is necessary to authorize the use of streets for the posts of a telegraph company. If such posts be erected within the limits of a street or highway without such sanction, they are nuisances; but if the erection be thus authorized, they are not.[3]

[1] People *v.* Benson, 30 Barb. 24; State *v.* Cincinnati Gas Company, *supra.*

[2] Angell on Highways, Secs. 25, 312; Milhau *v.* Sharp, 15 Barb. 210 *per Edwards*, P. J.; Kelsey *v.* King, 32 Barb. 410. Water company compelled to lower pipes laid in a street by legislative sanction, so as to conform to a new grade established by municipal authority: Commissioners *v.* Hudson, 2 Beas. (N. J.) 420. Water company's liability for negligent escape of water from pipes: Blyth *v.* Birmingham Water Works, 4 Exch. (Hurl. & Gord.) 781.

[3] Commonwealth *v.* Boston, 97 Mass. 555; Regina *v.* Telegraph Company, 9 Cox, Cr. Cas. 174, cited in Redfield on Carriers, Sec. 574, and note, where leading opinion of *Crompton*, J., is given; Young *v.* Yarmouth, 9 Gray, 386, construing the statute of Massachusetts.

§ 553. *Openings in Sidewalks.*—In many cities lot proprietors upon streets are permitted to make openings in the sidewalks, in order to obtain an entrance into the basement or cellar, and also to make openings under the sidewalk to give additional cellar room. If the fee of the street is in the municipality in trust for the public uses, as it frequently is, it extends to the whole street, including the sidewalk, and the adjoining lot owner would, it seems clear, have no right as against the public, or the municipality charged with the control of the streets, to appropriate them to this use. To recognize such a *right* would be inconsistent with the public rights, which are paramount to the whole street, and to all uses and servitudes required, or which may be required, for the public benefit and convenience. But such uses may be permitted by the municipality when they do not interfere with the public interests, and are authorized by their charters. If the fee of the street is in the adjoining owner, as it frequently is, the question as to the rightfulness of such a use of the sidewalk may not be so plain, and yet, even in this case, the public right must be paramount to individual interests, and the rights of the public are not limited to a mere right of way, but extend, as we have shown, to all beneficial uses, as the public good or convenience may from time to time require. The use of the streets for sewers, tunneling, public cisterns, gas pipes, water pipes, and other improvements, might be seriously affected by the recognition of a *right* in the abutter to make at pleasure openings in, or even under, the sidewalk or street. The correct view would seem to be that all rights of this character must come from legislative declaration or municipal license, express or implied from general usage.

§ 554. Speaking of this subject, the Supreme Court of Illinois remark: "We are not prepared to admit that the defendant could, by reason of his ownership of the adjoining property, claim the absolute right to take up the sidewalk and extend his coal cellar under it, but as such a privilege is a great convenience in a city, and may, with proper care, be exercised with little or no inconvenience to the public, we think that the authority to make such cellars may be implied, in the absence

of any action of the corporate authorities to the contrary, they having been aware of the progress of the work." "But," the court adds, "while we infer a license thus to use a part of the public street, it is on the condition that the person doing so shall use *more than ordinary care* and *expedition* in the prosecution of the work. Neither the public or other individuals derive any possible advantage from such a use of the sidewalk, but it is solely for the benefit of the person thus using it, and he must see to it that he does not endanger the safety of others, and that he incommodes the public as little as possible." [1]

Railroads in Cities.— Use of Public Streets by Railroads.— Extent of Legislative and Municipal Authority.

§ 555. Reference is elsewhere made to the plenary power of the legislatures of the states in this country over all public ways, including not only common highways, but streets within the limits of municipalities. It has often been decided, and is settled, that the legislature has the power to authorize the building of a railroad on a street or highway, and may directly exercise this power or devolve it upon the local or municipal authorities.[2]

[1] Nelson *v.* Godfrey, 12 Ill. 22, 23. *Supra*, Sec. 521, note. "What may be deemed a reasonable and proper use of a way, public or private, must depend much on the local situation and much on public usage. The general use and acquiescence of the public is evidence of the right:" O'Linda *v.* Lothrop, 21 Pick. 292, 297. *Infra*, Sec. 585.

[2] Mercer *v.* Railroad Company, 36 Pa. St. 99, 1859; Black *v.* Railroad Company, 58 Pa. St. 249; Philadelphia, &c. Railroad Company, 6 Whart. 25, affirmed in Commonwealth *v.* Railroad Company, 27 Pa. St. 339, 354; Green *v.* Reading, 9 Watts, 382; Henry *v.* Bridge Company, 8 Watts & Serg. 85; O'Connor *v.* Pittsburg, 6 Harris, 189; Railroad Company *v.* Adams, 3 Head, 596; Moses *v.* Railroad Company, 21 Ill. 516; Murphy *v.* Chicago, 29 Ill. 279; Railroad Company *v.* Municipality, 1 La. An. 128; 9 *ib.* 284; Geiger *v.* Filor, 8 Fla. 325; Springfield *v.* Railroad Company, 4 Cush. 63; Tate *v.* Railroad Company, 7 Ind. 479; Railroad Company *v.* Daily, 13 Ind. 353; S. C. *ib.* 551; People *v.* Kerr, 27 N. Y. 188; Clinton *v.* Railroad Company, 24 Iowa, 455; Lackland *v.* Railroad Company, 31 Mo. 180; Porter *v.* Railroad Company, 33 Mo. 128, 1862; James River Company *v.* Anderson, 12 Leigh (Va.), 276; Chicago *v.* Robbins, 2 Black, 424.

A *different view* has been sometimes taken. Thus, in Donnaher *v.* The State, 8 Sm. & Mar. 649, 1847, the court decided that where the statute under which a city was laid out vested the title of the streets in the city,

§ 556. If the *fee* in the streets or highways is in the public, or in the municipality in trust for public use, and is not in the abutter, the doctrine seems to be settled that the legislature may authorize them to be used by a railroad company in the construction of its road, without compensation to adjoining owners, or to the municipality, and without the consent, and even against the wishes, of either.[1]

§ 557. But where the *public have only an easement* in the street or highway, it has been generally, but not always, held that against the proprietor of the soil the use of the street or highway for the purposes of a steam railroad is an additional burden, which, under the constitutions of the different states, cannot be imposed by the legislature without compensation to such proprietor for the new servitude.[2]

that such streets cannot be subjected to the use of a railroad without the consent of the city, unless the damages to the city are assessed and paid. In other words, the legislature can only interfere with the use of the streets of the city by its exercise of the right of eminent domain; and if it exercises this right it must compensate the city. But this conclusion seems to have been adopted without sufficient reflection, and is undoubtedly erroneous. *Ante*, Chap. IV. Secs. 30–36.

In Great Britain *express legislative authority is necessary* to warrant streets to be used for the purposes of railways: Galbreath *v.* Armor, 4 Bell, App. Cas. 374; Queen *v.* Gas Company, 2 Ellis & El. 651; Queen *v.* Charlesworth, 16 Q. B. 1012; Regina *v.* Train, 9 Cox Cr. Cas. 180; 1 Barn. & Ad. 30. On the right of railways to occupy highways, see Redfield on Railways, Sec. 76, and notes.

[1] Clinton *v.* Railroad Company, 24 Iowa, 455, 1868; S. P. People *v.* Kerr, 27 N. Y. 188; Railroad Company *v.* Applegate, 8 Dana, 289; Williams *v.* Railroad Company, 16 N. Y. 97, *obiter;* Wager *v.* Railroad Company, 25 N. Y. 526; note observations on page 533; Protzman *v.* Railroad Company, 9 Ind. 467; 13 Ind. 353; *ib.* 551; Moses *v.* Railroad Company, 21 Ill. 522. See Cooley, Const. Lim. 555, 556, and notes; Hinchman *v.* Paterson Horse Railroad Company, 17 N. J. Eq. 75; People *v.* Law, 34 Barb. 494; Railway Company *v.* Philadelphia, 47 Pa. St. 325; Carson *v.* Railroad Company, 35 Cal. 325, 1868.

[2] Williams *v.* Railroad Company, 16 N. Y. 97, 1857; Wager *v.* Railroad Company, 25 N. Y. 526, 1862; Mahin *v.* Railroad Company, 24 N. Y. 658; Fletcher *v.* Railroad Company, 25 Wend. 462; Bissell *v.* Railroad Company, 23 N. Y. 61; Davis *v.* Mayor, &c. of New York, 14 N. Y. 526; Carpenter *v.* Railroad Company, 24 N. Y. 655; Gray *v.* Railroad Company, 13 Minn. 315; Williams *v.* Plank Road Company, 21 Mo. 580; Ford *v.* Railroad Company, 14 Wis. 616; Pomeroy *v.* Railroad Company, 16 Wis. 640. And this, says

§ 558. *Delegated Municipal Authority.*—The legislature, instead of granting, by direct act or general legislation, the power to railroad companies to occupy streets for the purpose of building and operating their roads, may delegate to municipalities the right to say when and upon what conditions, if at all, the public streets within their limits may be thus used.[1] The usual and ordinary powers of municipal corporations to

Judge *Cooley*, appears to be the weight of judicial authority: Const. Lim. 549. And such is also the opinion of Judge *Redfield*: Redfield on Railways (3d ed.), Sec. 76, and note.

It is now firmly established as law in New York, by the cases above cited, that the use of a street or highway for a railroad is an *additional* burden beyond the public easement, which cannot be imposed by the legislature directly, or by a municipal corporation derivatively, without compensation to the owner of the fee, whether it be city lots or country property; that such use without the consent of the fee owner, or acquiring the right under the law, by compensating him for it, is a wrong, for which trespass will lie, or ejectment to recover possession of the land, subject to the public easement. *Contra*, Porter *v.* Railroad Company, 33 Mo. 128. The author ventures to observe, however, that, in the absence of special constitutional restrictions, there is much to recommend the doctrine of the plenary power of the legislature over all streets and highways and public places, and their *uses*, which is asserted in the Pennsylvania cases, the leading one of which is the Philadelphia, &c. Railroad Company, 6 Whart. 25; affirmed, 27 Pa. St. 339, 354; criticised, Williams *v.* Railroad Company, 16 N. Y. 97, 106. See, also, O'Connor *v.* Pittsburg, 18 Pa. St. 187, 189; Commonwealth *v.* Passmore, 1 Serg. & Rawle, 217; approved, Chicago *v.* Robbins, 2 Black, 423.

[1] Mercer *v.* Railroad Company, 36 Pa. St. 99, 1859; Railroad Company *v.* Leavenworth, 1 Dillon, C. C. R. 393, 1871; Slatten *v.* Railroad Company, 29 Iowa, 148; Philadelphia *v.* Railroad Company, 3 Grant (Pa.), 403; Moses *v.* Railroad Company, 21 Ill. 516; Geiger *v.* Filor, 8 Fla. 325; Tate *v.* Railroad Company, 7 Ind. 479; Brooklyn, &c. Railroad Company *v.* Brooklyn, &c. Railroad Company, 32 Barb. 358; Railroad Company *v.* New York, 1 Hilton (N. Y.) 562; Wolfe *v.* Railroad Company, 15 B. Mon. 404; Commonwealth *v.* Railroad Company, 27 Pa. St. 339.

Grant construed not to be *exclusive* in the grantee: Brooklyn, &c. Railroad Company *v.* Coney Island, &c. Railroad Company, 35 Barb. 364; 18 N. Y. 160; Railway Company *v.* Kerr, 45 Barb. 138; Street Railroad Company *v.* City Railway Company, 2 Duvall (Ky.), 175.

If a railroad company is authorized to occupy the street of a city, it possesses, as a necessary incident, the power to make a "turn-out" within the limits of the street, to communicate with the depot on the street: Railroad Company *v.* Municipality, 1 La. An. 128; S. P. Knight *v.* Railroad Company, 9 *ib.* 284. Power to construct *railroad* in streets held to include sidings and branches to wharves: Black *v.* Railroad Company, 58 Pa. St. 249; Philadelphia *v.* Railroad Company, *ib.* 253.

regulate streets and keep them free from obstructions are not sufficient, it is believed, to empower them to authorize the use thereof for the purpose of constructing and operating thereon a *steam* railway, as these powers are not to be enlarged by construction, and were not conferred for this purpose.[1]

§ 559. Where, under the general statutes of a state, a railroad company was forbidden to construct and operate its road upon the streets of an incorporated city, "without the assent of the corporate authorities," these are not limited to a simple granting or denial of the right of way, but may prescribe conditions on which they will give their assent, and if these are accepted by the railroad company, they are binding upon the parties; and, accordingly, where the right of way along a street was granted by a city, on condition that the company should build a depot in a certain part of the city and grade, rip-rap, and pave the street it used, and the company agreed to accept it on these terms, it was held that it could not hold and enjoy the grant, and not comply with the conditions on which it was made.[2]

[1] Railroad Company *v.* Shiels, 33 Geo. 601, 1863. In this case it was held that the usual municipal power over streets does not give the municipal authorities the right to authorize a railroad company to lay their track lengthwise on one of the streets of a city on a grade requiring deep excavations and high embankments, to the great damage of the adjoining owner; See People *v.* Carpenter, 2 Doug. (Mich.) 273. *Infra*, Secs. 559, 560. In Kentucky, the doctrine is that the municipal authorities may consent to the use of streets by railway companies: Railroad Company *v.* Applegate, 8 Dana, 289, 1839; Wolfe *v.* Railroad Company, 15 B. Mon. 404, 1854; Railroad Company *v.* Brown, 17 B. Mon. 763, 1856. So, in Iowa, it has been decided that municipal corporations have the authority to authorize the use of streets by railway companies on such grade as their councils may prescribe; and that the company is not liable for the necessary damages to adjoining lot owners, resulting from the proper exercise of the power thus conferred: Slatten *v.* Railroad Company, 29 Iowa, 148, 1870.

[2] Railroad Company *v.* Leavenworth, 1 Dillon, C. C. R. 393, 1871; S. P. Railroad Company *v.* Baltimore, 21 Md. 93; City Railroad Company *v.* City Railroad Company, 20 N. J. Eq. (5 C. E. Green) 61, 1869.

In the Railroad Company *v.* Leavenworth, *supra*, an ordinance and contract, special in their terms, were construed to give the city a right to reenter and take possession of the street, and remove the railroad track, on the failure of the company to comply with the conditions of the ordinance granting to it the right of way. The case also considers the principles

§ 560. *Authority to Occupy and Use Streets — How Conferred, and Construed.* — Legislative authority to railroad companies to occupy the streets of an incorporated place, although it must exist to warrant the occupation, need not be expressly conferred, but may be given by necessary implication.[1] But a general grant to construct a railroad between certain *termini*, without prescribing its exact course or line, was considered to authorize the crossing of public highways, because this was necessary in order to execute the grant, but was not regarded as *prima facie* conferring the power to occupy highways longitudinally.[2]

which will, in such cases, govern the chancellor in granting or denying a temporary injunction against the city, to restrain it from taking possession of the street, and removing the rails, and preventing the running of the trains of the company.

Remedy by injunction by and against city corporation: Clinton *v.* Railroad Company, 24 Iowa, 455; S. C. *ib.* 482, note; Railroad Company *v.* Baltimore, 21 Md. 93: Morris, &c. Railroad Company *v.* Newark, 2 Stock. Ch. 352; Milwaukee *v.* Railroad Company, 7 Wis. 85. Remedy by injunction by adjoining owners: Zabriskie *v.* Railroad Company, 2 Beasl. 314; Hinchman *v.* Railroad Company, 17 N. J. Eq. 75; Ford *v.* Railroad Company, 14 Wis. 609; Milburn *v.* Railroad Company, 12 Iowa, 246. *Post*, Chap. XXII. Effect of delay by city in applying for injunction when assent has been given, but conditions have not been complied with: Railroad Company *v.* Baltimore, 21 Md. 93; Clinton *v.* Railroad Company, 24 Iowa, 485, note.

[1] *Ante*, Sec. 558. Commonwealth *v.* Railroad Company, 27 Pa. St. 339; Allegheny *v.* Railroad Company, 26 Pa. St. 355.

The implication must be a necessary one, and the legislative intent must appear with great clearness, to justify a company in laying their track through the entire length of a street, with a grade requiring deep excavations and high embankments, injurious to the adjoining property: Railroad Company *v.* Shiels, 33 Geo. 601, 1863.

[2] Clinton *v.* Railroad Company, 24 Iowa, 455, 480, 1868; Springfield *v.* Railroad Company, 4 Cush. 63, 1849, where the subject is fully considered by *Shaw*, C. J. And the court held that if the road, chartered by the legislature, could not be built [in Cabotville] without using a street or highway, so much of such street or highway might be used, although there were no express words to that effect in the charter, as should be "reasonably sufficient to accommodate all the interests concerned, and to accomplish the objects for which the grant was made." See, also, Roxbury *v.* Railroad Company, 6 Cush. 424, 1850; Brainard *v.* Railroad Company, 7 Cush. 506; Moses *v.* Railroad Company, 21 Ill. 516; Railroad Company *v.* Payne, 8 Rich. (South Car.) Law, 177; Commonwealth *v.* Railroad Company, 27 Pa. St. 339; Attorney General *v.* Railroad Company, 4 C. E. Green (N. J.), 586.

§ 561. A railroad laid out over or on a highway or street so as to obstruct it, without express statute authority or necessary implication, is liable to indictment as a nuisance.[1] And the company may be enjoined from laying down their track by the public authorities, or by lot owners specially injured.[2]

§ 562. Under general laws conferring upon railway companies the right of way over highways, and under special charters or general acts giving to incorporated places the right to grade, improve, regulate, and control public streets within their limits, embarrassing and difficult questions have arisen, depending for their solution upon the supposed intention of the legislature to be collected from the body of the legislation on the subject.[3]

By construction of the statute in Massachusetts, a railroad corporation is primarily liable to third persons for damages caused to their estates by raising a street of a city so that its railroad may pass under the same; and this primary liability is not changed or affected by the fact that the city takes from the railroad company a bond of indemnity: Gardiner *v.* Boston, &c. Railroad Corporation, 9 Cush. 1, 1851. *Post*, Chap. XXII.

Where railroad alters highway it is bound, by effect of the legislation in Massachusetts and Connecticut, to restore the highway to a safe condition, and this obligation is a continuing one, and the railroad company cannot protect itself against the liability to indemnify the town, on the ground that the statute of limitations would bar an action against the railroad company for the original construction of the nuisance. The town may look to the railroad company which constructed the nuisance, and it is no defence, *it seems*, that at the time of the accident the road is in the hands of another company as lessee: Hamden *v.* Railroad Company, 27 Conn. 158, 1858, approving Lowell *v.* Railroad Company, 23 Pick. 24; Wellcome *v.* Leeds, 51 Maine, 313; Veazie *v.* Mayo, 45 *ib.* 560; S. C. 49 *ib.* 156. Respective rights of railroad company, the municipal corporation, and lot owners, growing out of the crossing of streets and highways by railroads, see, generally: Hughes *v.* Railroad Company, 2 Rh. Is. 493; Railroad Company *v.* Decatur, 33 Ill. 381; Nicholson *v.* Railroad Company, 22 Conn. 74.

[1] Commonwealth *v* Railroad Company, 14 Gray (Mass.), 93.

[2] Railroad Company *v.* Shiels, 33 Ga. 601, 1863; *supra*, Secs. 520, 522.

[3] Milburn *v.* Railroad Company, 12 Iowa, 246; Clinton *v.* Railroad Company, 24 Iowa, 455; Railroad Company *v.* Adams, 3 Head (Tenn.) 596; Drake *v.* Railroad Company, 7 Barb. 508; Milhau *v.* Sharp, 15 Barb. 193; 27 N. Y. 611; Plant *v.* Railroad Company, 10 Barb. 26; Adams *v.* Railroad Company, 11 Barb. 414; Redfield on Railways, Sec. 76.

Power in the charter of a city "to open, alter, abolish, widen, extend, grade, or otherwise improve or keep in repair streets," does not authorize

§ 563. If a city, without authority from its charter or statute, and without rent or compensation, licenses individuals to occupy for their *private benefit*, a public street with a railroad, and other property owners suffer special damage, the city is not liable therefor even though the licensees may have given it a bond of indemnity. Such licensees are not the agents of the city, and the license does not authorize them to do any damage to others. If it had the power to grant such a license, "that power would not authorize it to make itself responsible for the acts of others, from which neither it nor its citizens derived any benefit, and which were not done for the accommodation of the public travel and business."[1] Such a case is to be distinguished from *tortious* acts done by the direction or procurement or sanction of a city corporation for which it is liable.[2]

§ 564. Where there is legislative authority, either immediately, or through the authorized action of municipalities, for the occupation and use of streets for the uses of a railroad, this will protect the railway companies from prosecutions and suits for public nuisances, but it will not affect their liability to ad-

the council thereof to grant the right to a railroad company to obstruct the street by permanent structures inconsistent with its use as a street: Lackland *v.* Railroad Company, 31 Mo. 180, 1860; Same *v.* Same, 34 Mo. 259. Read in connection, Porter *v.* Railroad Company, 33 Mo. 128. In the case last cited, it appeared that in the charter of the company it was authorized by the legislature to build its road "along or across any state or county road, or street, or wharves of any city," but it "shall not be so constructed as to prevent the public from using the road, street, or highway along or across which it may pass;" and it was held that the ordinary use by a railroad under this charter, with the consent of the municipality, of a street was not a perversion of the highway from its original purposes, and that the resulting damage to adjoining property was *damnum absque injuria*. But the company is liable to one suffering special damages for using the street in an unauthorized and illegal manner: 34 Mo. 259, *supra;* Commonwealth *v.* Railroad Company, 27 Pa. St. 339.

[1] Green *v.* Portland, 32 Maine (2 Reding), 431, 1851; Roll *v.* Augusta, 34 Ga. 326, 1866.

"It is the settled law of this court, as well as in most of the other states of the Union, that it is a legitimate use of a street or highway to allow [under legislative authority] a railroad track to be laid down in it, and for so doing the city is not liable for any damages which may accrue to individuals:" *Per Caton*, C. J., Murphy *v.* Chicago, 29 Ill. 279, 286, 1862.

[2] Thayer *v.* Boston, 19 Pick. 511; 12 *ib.* 184. *Post*, Chap. XXIII.

joining owners in those states where such owners are entitled to compensation for the additional servitude of such a use of their lands.[1] There are cases which hold that when railroad companies are authorized to use streets, either by the legislature, or by competent municipal action, there is a liability, in certain cases, to the adjoining proprietor for consequential damages, other than for property taken; but questions of this character do not fall within the province of this work.[2]

§ 565. *Municipal Control.— Rate of Speed.— Obstructions.*— Resulting from the power over streets, and to protect the safety of citizens and their property, municipal corporations, in the absence of legislative restriction, may control the mode of propelling cars within their limits, may prohibit the use of steam power, and regulate the rate of speed.[3] Although a

[1] Fletcher *v.* Railroad Company, 25 Wend. 462, 1841; Mahon *v.* Railroad Company, Hill & D. Suppl. 156; Hamilton *v.* Railroad Company, 9 Paige, 171; Drake *v.* Railroad Company, 7 Barb. 508; Robinson *v.* Railroad Company, 27 Barb. 512; Ford *v.* Railroad Company, 14 Wis. 609, 1861; Protzman *v.* Railroad Company, 9 Ind. 467, 1857; Redfield on Railways, Sec. 76, and notes.

[2] Railroad Company *v.* O'Dailey 13 Ind. 353, 1859; S. C. 12 *ib.* 551; Lackland *v.* Railroad Company, 34 Mo. 259; Same *v.* Same, 31 Mo. 180; Porter *v.* Same, 33 Mo. 128; Hinchman *v.* Patterson Horse Railway Company, 17 N. J. (2 C. E. Green) 75–83; Zabriskie *v.* Railroad Company, 2 Beas. (N. J.) 314; McLauchlin *v.* Railroad Company, 5 Rich. (S. C.) Law, 583, 1850; Street Railroad Company *v.* Cumminsville, 14 Ohio St. 523.

In Indiana the fee simple of streets in towns and cities *seems* to be in the public; at all events, it is held that taking the street for the laying down of the track of a railroad is not taking such an "interest in the land" as, under the statute, will entitle the adjoining proprietor to the statutory remedy for compensation. Such proprietor may sue for the consequential injury, but cannot *restrain* on the ground that a railroad in a city is a nuisance: New Albany &c. Railroad Company *v.* O'Dailey, 13 Ind. 353, 1859; S. C. 12 *ib.* 551; Protzman *v.* Railroad Company, 9 *ib.* 467, 1857. Further, as to nature of rights of adjoining lot owner in street, regarding the use of the street "as appurtenant to the lot," and as property: Haynes *v.* Thomas, 7 Ind. 38. City council cannot, by its license, give a railroad company such a right to lay down its track in a public street as will protect it from an action by the adjacent lot owner who is injured by a change in the grade or elevation of the street: Protzman *v.* Railroad Company, 9 Ind. 467, 1857. Distinguished from Snyder *v.* Rockport, 6 Ind. 237, 1855. But see Slatten *v.* Railroad Company, 29 Iowa, 148, 1870.

[3] Donnaher *v.* State, 8 Sm. & Mar. (Miss.) 649, 1847; Redfield on Railways (2 Ed.), 616; Railroad Company *v.* Buffalo, 5 Hill (N. Y.), 209. See ordinances—*ante*, p. 330, Sec. 326.

railway passing through the streets of a city is not necessarily a nuisance, yet, if it is so operated as to become dangerous to private property, it may become a nuisance, and be indicted or otherwise proceeded against, accordingly.[1] A municipal corporation, by virtue of its police authority and power over its streets, may enact an ordinance to prohibit cars from obstructing the crossing of its streets; and the court expressed the opinion that trains could be so made up, and the road so operated, as to make it unnecessary to block up the streets.[2]

§ 566. *Horse Railways in Streets.—Municipal Control.*—The power of municipal corporations to authorize the establishment of horse railways within their limits, or to authorize the use of the public streets for that purpose, has presented some interesting questions for adjudication. In a leading case—Davis *v.* The Mayor of New York[3]—it appeared that the city corporation, by its charter, possessed general power to open, alter, repair, and regulate the streets. By virtue of this power, and without any express authority, mediately or immediately, from the *legislature*, the corporation of the city undertook, by resolution, to confer upon an association of persons the *exclusive* right to construct and maintain for a *term of years* a railway in Broadway for the transportation of passengers for profit. It was the opinion of five of the seven judges of the Court of Appeals taking part in the decision of the cause that the resolution was void. The judges delivering opinions discussed the question, whether the municipal government, in the exercise of their authority over the streets, might construct, or by mere license, revocable at pleasure, authorize others to construct, such a railway, but reached different conclusions upon it.

[1] Hentz *v.* Long Island Railway, 13 Barb. 646, 1852; State *v.* Tupper, Dudley (S. C.), Law, 135, 1838. See, also, Redfield on Railways (2 Ed.), 616, and authorities there cited. Pierce on Railways, 245–48. Construction of special charter on the subject: State *v.* Jersey City, 5 Dutch. (N. J.) 170, 1861. Indictment: *Post*, Chap. XXII.

[2] Railroad Company *v.* Galena, 40 Ill. 344, 1866; Railroad Company *v.* Chenoa, 43 Ill. 209. An ordinance forbidding "any kind of obstruction" in the streets was deemed comprehensive enough to embrace the obstruction of a street by a railroad company with its cars: Railroad Company *v.* Galena, 40 Ill. 344, 1866; Railroad Company *v.* Decatur, 33 Ill. 381; Gahagan *v.* Railroad Company, 1 Allen (Mass.), 187.

[3] Davis *v.* Mayor, &c. 14 N. Y. 506, 1856.

§ 567. The judgment of the court in the case just mentioned rests upon the sound principle that the powers of a corporation in respect to the control of its streets are held in trust for the public benefit, and cannot be surrendered or delegated by contract to private parties; and hence the resolution of the council authorizing private persons to construct and operate a railroad upon certain terms, without power of revocation and without limit as to time, was not a license or act of legislation, but a contract; void, however, because if valid it would deprive the corporation of the control and regulation of its streets. "Taking the whole ordinance together," says *Comstock*, J., in his opinion, "it is no less than an abrogation by the common council of their powers and duties over and concerning the public streets, and a surrender of a considerable portion of those powers and duties into the hands of private individuals, or a private corporation. This the corporation of New York cannot do. Time and experience may give a very unfavorable solution to the question whether this railroad, or any railroad in Broadway, can be beneficial to the public, but the hands of the city government will be tied by the contract into which it has entered, and future change and improvement may be prevented by the voluntary surrender — in effect in perpetuity — of its own powers. On this ground the ordinance is void."[1] And this view was subsequently approved by the same court,[2] and is unquestionably sound.

§ 568. In Great Britain, legislative authority or sanction is necessary to enable the town or others to occupy the streets or highways for the purpose of a horse or street railway;[3] and such is doubtless the law in this country.[4] Whether powers

[1] *Per Comstock*, J., in Davis *v.* The Mayor, &c. of New York, 14 N. Y. 506, 532.

[2] Milhau *v.* Sharp, 27 N. Y. 611, 1863; S. C. 15 Barb. 528; followed, Coleman *v.* Railroad Company, 38 N. Y. 201. See Hinchman *v.* Patterson Horse Railroad Company, 17 N. J. Eq. (2 C. E. Green) 75; City Railroad Company *v.* Memphis, 4 Coldw. (Tenn.) 406, 1867. *Ante*, Sec. 61.

[3] Galbreath *v.* Armour, 4 Bell App. Cas. 374; Queen *v.* Gas Company, 2 Ellis & El. 651; Queen *v.* Charlesworth, 16 Q. B. 1012; Regina *v.* Train, 9 Cox Cr. Cas. 180.

[4] Boston *v.* Richardson, 13 Allen (Mass.), 146, 160, *per Gray*, J.; City Railroad Company *v.* Memphis, 4 Coldw. (Tenn.) 406, 1867; Redfield on Rail-

granted to municipalities will include the authority to consent to such a use of the streets by an authorized company, is one of construction, when the authority is not conferred in express and specific terms.

§ 569. The charter of New Orleans gave to the city the power "to *regulate* and *improve* streets," and to "regulate carts, &c., and vehicles of every description, thereon;" and a state law, in relation to public improvements, declared that "no railroad, plank road, or canal should be constructed through the streets of any incorporated city or town without the consent of the municipal council thereof." Under these circumstances, it was held competent for the city to grant the right of way in the streets to private individuals, for a specified time, for the purpose of laying down rails and running horse cars over them, according to a tariff to be fixed by the common council.[1]

ways (3 ed.), p. 317, top, where the valuable report of this learned and able jurist to the Massachusetts legislature, in respect to the rights and interests of *street railways*, is re-printed. After stating that it is not competent for any one to lay a passenger railway in the streets at his option, and that municipalities cannot create such companies, Judge *Redfield*, in the report above mentioned, observes that "it is now entirely well settled that such a franchise in the highways can only be created by legislative grant. It is a franchise to carry passengers and to demand tolls. This is one of the prerogatives of sovereignty, and derivable only through the action of the legislature. * * * It is not like ordinary mechanical or manufacturing business, which any one many institute at pleasure:" *Ib.* 319, 320.

In the charter of a street railway company, it was authorized to use the streets of a city upon obtaining the consent of the council, and by a supplement it was authorized to construct several tracks specified, no reference being made to any consent of the council; and it was decided that, as to such tracks, the consent of the council was unnecessary: Jersey City *v.* Railroad Company, 20 N. J. Eq. (5 C. E. Green) 360, 1869.

[1] Brown *v.* Duplessis, 14 La. An. 842, 1859. The Supreme Court of Louisiana, in the case just cited, in holding that the adjacent lot owners could not enjoin the city from authorizing the use of the public streets for laying down and operating horse railways, assign the following reasons for their judgment: "Streets, public walks, and quays are things which belong in common to all inhabitants of cities and other places, and to the use of which all the inhabitants of a city or other place, and even strangers, are entitled in common (Civil Code, 449, 444–5). Plaintiffs cannot, then, claim an exclusive use of the streets, or complain if their use be impeded by a similar use of the streets by other persons. * * * No citizen has a legal

§ 570. Aside from the question as to the right of adjoining lot owners to additional compensation, the legislature has the undoubted power to authorize at pleasure the use of streets for railroad purposes; and the usual extensive powers conferred upon municipal corporations to improve and control streets and regulate their use will, it is believed, ordinarily authorize them to use, or permit the use of, streets for *horse* railways, provided they do not surrender or abdicate their legislative and police powers and functions with respect to the streets and the persons or corporations thus licensed to use them. The legislature may authorize the municipalities to give or withhold an absolute assent to such a use of their streets, or it may leave them free to annex conditions, or it may itself require certain conditions to be met before the grant shall be made by the municipal authorities.[1]

right to complain that the streets are used by other citizens in a peculiar manner, even if it causes him a little inconvenience, so long as he himself is allowed the free use of the streets in his peculiar mode. The streets are destined for public use, but not for a *particular* mode of public use. If the city of New Orleans wished to expend the money necessary for the laying of rails throughout the city, for the purpose of permitting all who wished to run their own cars thereupon, drawn by horses or mules, no one could complain, so long as it did not prevent other modes of traversing the streets, for traveling in cars on rails is one mode of using public streets, and there is no reason in the nature of things why it should be lawful to travel in a carriage or gig upon the streets, and not lawful to travel in a car upon rails fixed in the streets, but not so laid as to prevent the use of the streets by other modes of conveyance. If it does not suit the public coffers or the public convenience that the city should lay rails for the free use of the public, it follows, from the premises [but see, on this point, Davis *v.* The Mayor, &c. *supra*], that the city has the prerogative of selling the right of way, for a specified time, to one or more persons, who shall lay rails and have the privilege of running cars, drawn by horses or mules, according to a tariff fixed by the common council. This does not impede the ordinary mode of use, promotes trade, unites distant parts of the city, benefits the health of citizens by enabling them to live beyond the crowded thoroughfares, and is not an alienation or appropriation of a portion of the public streets for private uses: " *Per Cole*, J., in Brown *v.* Deplessis, 14 La. An. 842, 1859. *Ante*, Secs. 61, 566, 567.

[1] Railroad Company *v.* Baltimore, 21 Md. 93; Railroad Company *v.* Leavenworth, 1 Dillon, C. C. R. 393, 1871; Frankford Passenger Railway Company *v.* Philadelphia, 58 Pa. St. 119, 1868; Moses *v.* Railroad Company, 21 Ill. 522; Clinton *v.* Railroad Company, 24 Iowa, 455; People *v.* Kerr, 27 N. Y. 188; Hinchman *v.* Patterson Horse Railroad Company, 17 N. J. Eq. (2 C.

§ 571. Thus, by a statute of Ohio relating to the construction of street railways, city councils were prohibited from permitting their construction without "the consent of a majority in interest of the owners of the property upon the street being first had and obtained," and it was held that such consent was a condition precedent to the power of the city to grant such permission, and that the action of the city council giving permission did not conclude the property owner on the question whether the requisite majority had assented.[1] It was also decided in the same case that a second or additional track was in the nature of a new enterprise, and required an independent consent of the property owners interested, and that those who had assented a year before to a single-track road could not be counted.[2] But even direct legislative authority to a street

E. Green) 75; Commonwealth *v.* Central Passenger Railway, 52 Pa. St. 506; Philadelphia *v.* Railroad Company, 3 Grant (Pa.), 403; Railroad Company *v.* O'Daily, 12 Ind. 551; Railroad Company *v.* Applegate, 8 Dana (Ky.), 289; City Railway Company *v.* Louisville, 4 Bush (Ky.), 478; Railroad Company *v.* Adams, 3 Head (Tenn.), 596; People *v.* Railroad Company, 45 Barb. 73; Sixth Avenue Railroad Company *v.* Kerr, 45 Barb. 63; McFarland *v.* Railroad Company, 2 Beasl. (N. J.) 314; Brooklyn, &c. Railroad Company *v.* Railroad Company, 32 Barb. 358; Railroad Company *v.* New York, 1 Hilton (N. Y.), 562; Mercer *v.* Railroad Company, 36 Pa. St. 99, 1859; City Railroad Company *v.* Memphis, 4 Coldw. (Tenn.) 406, 1867; City Railroad Company *v.* City Railroad Company, 20 N. J. Eq. 61, 1869.

The *extent of municipal power and control over street railways and common railways* depends, of course, on the charter of the company and that of the municipality. See State *v.* Hoboken, 1 Vroom (N. J.), 225; Frankford Passenger Company *v.* Philadelphia, 58 Pa. St. 119; New York *v.* Third Avenue Railroad Company, 33 N. Y. 42; Philadelphia *v.* Lombard, &c. Railroad Company, 3 Grant (Pa.), 403; Street Railway Company *v.* Cumminsville, 14 Ohio St. 523; McFarland *v.* Railroad Company, 2 Beasl. (N. J.) 314; State *v.* Jersey City, 5 Dutch. (N. J.) 170; Passenger, &c. Company *v.* Birmingham, 51 Pa. St. 41; Wolfe *v.* Railroad Company, 15 B. Mon. (Ky.) 404; Redfield on Railways, Sec. 76, and notes; McFarland *v.* Horse Railroad Company, 2 Beasl. Ch. (N. J.) 17; State *v.* Herod, 29 Iowa, 123, 1870; Slatten *v.* Railroad Company, *ib.* 148.

[1] Roberts *v.* Easton, 19 Ohio St. 78, 1869. *Ante*, Secs. 417–420, 424.

[2] *Ib.* And it was further held in this case, that the act of the legislature forbidding city councils from permitting the streets to be used for a street railway without the assent of property owners thereon, recognizes in them such an interest as entitles *them* to an injunction against the construction of the road where the council granted permission without the requisite consent of the proprietors interested being obtained. *Ante*, Sec. 522.

passenger railway corporation to carry passengers in cars over the streets of a city does not exempt that corporation from municipal control. Indeed, the principle is a general one, that when a business is authorized to be conducted by a corporation within a municipality, the latter presumptively possesses the same right to regulate it that it possesses over the like business if conducted by private persons.[1]

§ 572. *Rights and Liability of the Company.*—Rails laid down by a horse railroad corporation in a public street are the private property of the corporation, so that a rival corporation cannot use them on the ground that they, as part of the public, have the right to travel and run cars anywhere on such street.[2] A street railway company authorized by the legislature to lay down its track upon the streets of a city, subject to such restrictions as the city council might impose, constructed its track under the direction of the city engineer, but in such a manner in crossing a gutter as to cause surface waters to overflow and injure one of the adjoining proprietors, and it was held that the company was liable for the damages resulting from the improper construction of their track.[3]

[1] Frankford Passenger Railway Company *v.* Philadelphia, 58 Pa. St. 119, 1868; State *v.* Herod, 29 Iowa, 123, 1870; City Railway Company *v.* Louisville, 4 Bush (Ky.) 478.

[2] City Railroad Company *v.* City Railroad Company, 20 N. J. Eq. 61, 1869; Brooklyn Railroad Company *v.* Railroad Company, 32 Barb. 358.

Street railway companies have an easement in the land or street on which their track is laid: it is private property, *subject to taxation*, and if no different provision be made, may be taxed as real property, or assessed for benefits derived from local improvements: Street Railway Company Appeal, 32 Cal. 499, 1867. Passenger car on street railway is entitled, as against common vehicles, to *preference in the use* of its rails, and to an unobstructed road: Wilbrand *v.* Eighth Avenue Railroad Company, 3 Bosw. (N. Y.) 314.

Street Railway company held *liable for an injury* to a traveler with carriage, caused by the projection of a spike, which ought not to have been permitted: Fash *v.* Third Avenue Railroad Company, 1 Daly (N. Y.), 148. It is the duty of the company, on the one hand, to exercise due care to avoid collisions, and the duty of travelers, on the other, to use proper diligence to avoid accidents and injuries: Liddy *v.* St. Louis Railroad Company, 40 Mo. 506; Lovett *v.* Railroad Company (injury to boy), 9 Allen, 557; Burton *v.* Railroad Company, 4 Harring. (Del.) 252; Street Railroad Company *v.* Smith, 2 Duvall (Ky.), 556.

[3] Horse Railroad Company *v.* Deitz, 50 Ill. 210, 1869.

§ 573. Whether the use of a street for a horse railway is an *additional burden* upon the land of the adjoining proprietor, is a question upon which there is a diversity of judicial opinion. In New York it is considered to be a new servitude, for which the adjacent owner is entitled to compensation.[1] But in Connecticut the opposite view is taken, although in that state it is declared to be the law, that a street or highway cannot be used for an *ordinary* railway without compensation for such use to the owner of the fee.[2] The author regards the appropriation of a street for a horse railway, constructed and used in the ordinary mode, to be such a use as falls within the purpose for which the streets are dedicated or acquired under the power of eminent domain. When authorized or regulated by the public authorities, this is a public use within the fair scope of the intention of the proprietor when he dedicates the streets or is paid for property to be used as streets. Such proprietor must be taken to contemplate all improved and more convenient modes of use. There is solid ground to distinguish between horse railways in streets, as ordinarily laid and used, which do not exclude the public, and common railways, which are generally so constructed as altogether to exclude a portion of the street from public use in the accustomed modes; and yet, there is much to recommend as sound, the view that where property is dedicated to the public for a street, the dedicator must be presumed to intend that it may be used as a street in such way as the legislature representing the public, and best acquainted with the public needs, may authorize.

§ 574. Where the original proprietor parts with the fee, which is vested by statutes in some of the states, in the public,

[1] Craig *v.* Railroad Company, 39 N. Y. 404; S. C. 39 Barb. 449; Wager *v.* Railroad Company, 25 N. Y. 532.

[2] Elliott *v.* Railroad Company, 32 Conn. 579: distinguished from Imlay *v.* Railroad Company, 26 *ib.* 249, and that case commented on. And see opinion of *Ranney*, J., in Street Railway *v.* Cumminsville, 14 Ohio St. 523, 1863. And it is the opinion, also, of the learned Chancellor *Zabriskie*, that a steam railway is, while a horse railway is not, an additional servitude: City Railroad Company *v.* City Railroad Company, 20 N. J. Eq. 61, 1869. See, also, to same effect, the opinion of *Green*, Chancellor, in Hinchman *v.* Railroad Company, 17 N. J. Eq. 75, 1864.

or in the municipality for the use of the public, the courts concur in holding that the leigslature may, in such case, authorize the street or highway to be used for a street railway, or even an ordinary railway, without his consent, and without compensation to him.[1]

§ 575. In this section and the three following we *sum up the conclusion* to which our mind has arrived, after an examination of all of the reported cases upon the subject of railways in streets.

1. As respects ordinary railways, operated by steam, and street railways, operated by horses, legislative authority is necessary to warrant them to be placed in the streets or highways. The legislature may delegate to municipal or local bodies the right to grant or refuse such authority. The usual powers of a general nature in municipal corporations over streets are not sufficient to confer upon them the right to

[1] People *v.* Kerr, 27 N. Y. 188–211; S. C. 37 Barb. 357; Clinton *v.* Railroad Company, 24 Iowa, 455; Railroad Company *v.* Applegate, 8 Dana, 289; Williams *v.* Railroad Company, 16 N. Y. 97, *obiter;* Wager *v.* Railroad Company, 25 N. Y. 526, and note observations, 533; Protzman *v.* Railroad Company, 9 Ind. 467; Railroad Company *v.* O'Daily, 13 Ind. 353; Moses *v.* Railroad Company, 21 Ill. 522; Railroad Company *v.* Leavenworth, 1 Dillon, C. C. R. 393–402; Milburn *v.* Cedar Rapids, &c. Railroad Company, 12 Iowa, 246. Mr. Justice *Cooley's* observations on the general subject are very interesting: Const. Lim. 545–557. *Ante*, Sec. 491, *et seq.*

As to nature of *the franchises* in a charter to build and operate a street railway: See Redfield on Railways, Sec. 76, and notes; Metropolitan Railroad Company *v.* Quincy Railroad Company, 12 Allen (Mass.), 262; Railroad Company *v.* City Railway Company, 2 Duvall (Ky.), 175; Central Railroad Company *v.* City Railroad Company, 32 Barb. 358; Chicago *v.* Evans, 24 Ill. 52; City Railway Company *v.* City Railway Company, 20 N. J. Eq. 61, 1869; Street Railway *v.* Cumminsville, 14 Ohio St. 523: This case holds that the mere use of a street for a street railway does not impose a new use, so as to give abutters the right to compensation, but under a peculiar view in that state as to effect of a change of grade (see Crawford *v.* Delaware, 7 Ohio St. 459, and previous cases), grades once fixed and acted on cannot be altered to the damage of the adjacent lot owner. Nature of the rights of the company in *the street*, discussed by *Sawyer*, J.: Street Railway Company Appeal, 32 Cal. 499, 1867.

Rights of city under provision in charter of a street railway giving the city an *election to purchase at a future time:* Cambridge *v.* Cambridge Railroad Company, 10 Allen, 50. Effect of use, under legislative authority, of street by plankroad company: Bagg *v.* Detroit, 5 Mich. 336. *Ante*, p. 520, n.

authorize the appropriation of streets by ordinary railroads, whose tracks are constructed in the usual manner and whose trains are propelled by steam. But it is otherwise as respects street railways, and the ordinary powers of municipal corporations are usually ample enough, in the absence of express legislation on the subject, to authorize them to permit or refuse to permit the use of streets within their limits for such purposes. But they cannot, by any implied power, confer corporate franchises or authorize the taking of tolls. This must come from the legislature.

§ 576. 2. The weight of judicial authority at present undoubtedly is, that where the public have only an easement in streets, and the fee is retained by the adjacent owner, the legislature cannot, under the constitutional guarantee of private property, authorize a steam railroad to be constructed thereon, against the will of the adjoining owner, without compensation to him. In other words, such a railway, as usually constructed and operated, is an additional servitude. The author, not disputing the justice of this view, or that it is the one best supported by the judgments of the courts, is of opinion that it will admit of fair debate, and deserves further consideration whether the power of the legislature over *uses* to which highways may be put is really subject to this supposed constitutional limitation. Although the decisions as to the right of the legislature in such case to authorize street railways without compensation to the adjoining freeholder, are conflicting, it is believed that such railways, as ordinarily constructed and used, do not create a new burden upon the land, and hence the legislature is not bound to, although it may, provide for compensation to the adjoining proprietor.

§ 577. 3. Where the *fee* of the street is in the municipality in trust for the public, or in the public, the control of the legislature is supreme, and it may authorize or delegate to municipal bodies the power to authorize either class of railways to occupy streets without providing for compensation either to the municipality or to the adjoining lot owners. But where grades are altered, or actual damages will be caused by such use, the legislature ought to provide that the abutters should be compensated for the injury they will sustain.

§ 578. 4. As special legislative authority is necessary to enable a company to construct a passenger railway in the streets, the effect of such authority, when obtained and acted upon, is to give the company a property in the franchise and road, and hence no rival company has the right to use the track of the company which laid it down. Nor can an individual or other company, at pleasure and without legislative authority, construct a rival line in the same highway. But a legislative grant of authority to construct a street railway is not exclusive unless so declared in terms, and therefore the legislature may, at will, and without compensation to the first company, authorize a second one on the same streets or line, unless it has disabled itself by making the first grant irrepealable and exclusive. Whether it can effectually disable itself in this manner of its control over highways, is a question of a nature elsewhere referred to, and which it is not necessary to discuss in this place. But whatever may be the extent of legislative power in this respect, it is clear to our mind that the legislature cannot, without compensation to the first company, authorize the second company to take or use the track of the first, although with compensation this might be done under the power of eminent domain, if, in its judgment, the public good required it. The extent of municipal police and other control over street railways depends, of course, upon their charters, and the legislation of the state touching the subject.[1]

§ 579. *Bridges.*—Having considered the relation of municipal corporations to streets and highways within their limits, it remains to refer briefly to bridges. Bridges are usually part of the street or highway,[2] and in this country the power of municipal corporations to build them, and their authority over them, are wholly statutory, and their duties in respect to them are either declared by statute or spring from their powers. There is no common law responsibility on municipal corpora-

[1] Since the above was written, the author is gratified to learn that his views are coincident with those expressed by Chancellor *Zabriskie* in his able opinion in the City Railroad Company *v.* City Railroad Company, 20 N. J. Eq. (5 C. E. Green) 61, 1869.

[2] Chicago *v.* Powers, 42 Ill. 169, 1866; Manderschid *v.* Dubuque, 29 Iowa, 73, 1870.

tions in respect to the repair of bridges within their limits; but where bridges are part of the streets, and built by the municipal authorities under powers given to them by the legislature, they are liable for defects therein, on the same principles and to the same extent as for defective streets, and therefore no extended separate treatment in this place is necessary.[1]

[1] *Ib.* Smoot *v.* Wetumpka, 24 Ala. 112, 1854; Richardson *v.* Turnpike Company, 6 Vt. 496, 1834; Turnpike Company *v.* Berry, 5 Ind. (Port.) 286, 1850; Humphreys *v.* County, 56 Pa. St. 204, 1867; Cooley *v.* Freeholders, 3 Dutch. (N. J.) 415, 1859. *Post*, Chaps. XX. XXIII.

Bridge defined: State *v.* Gorham, 37 Maine, 451; Regina *v.* Derbyshire, 2 Q. B. 745; Sussex *v.* Strader, 3 Harris. (N. J.) 108. The word "bridge" may embrace within its meaning such abutments as are necessary to make the structure accessible and useful: Tolland *v.* Willington, 26 Conn. 578; Bardwell *v.* Jamaica, 15 Vt. 438; Board, &c. *v.* Strader, 3 Harris. (N. J.) 108; Rex *v.* West Riding, 7 East. 596. Approaches to: Commonwealth *v.* Deerfield, 6 Allen, 449. Both by the common law and the statute of 22 Henry VIII., affirming it, the duty of repairing public bridges rested upon the *county* in all cases where no private person or other body is specially charged therewith: 2 East, 342, 356; 2 Inst. 700, 701; Hill *v.* Supervisors, 12 N. Y. (2 Kern.) 52, 1854. See Follett *v.* People, *ib.* 268, 273, relating to obligations of pier proprietors under statute to maintain a bridge; also, on same point, The People *v.* Cooper, 6 Hill, 516; 2 Comst. 165, 173. In New York this common law responsibility of *counties* never prevailed; but, by statute, this responsibility is primarily upon the *towns:* Hill *v.* Supervisors, 12 N. Y. (2 Kern.) 52, 1854; Bartlett *v.* Crozier, 17 Johns. 439. A provision in a statute that a certain bridge, when completed, shall be a public bridge, and "under the control of the *county supervisors*," makes it a *county* charge: The People *v.* Supervisors, 1 Hill, 50, 1841. Whether *mandamus* lies to compel the body bound to repair bridges and highways to do so, or whether the remedy is by indictment, *quære:* 1 Hill, 50, *supra.* If a bridge is built by an *individual* for his *own exclusive benefit*, over a highway, he is bound to keep it in a safe condition, or respond to an action for damages to any person injured by his omission: *Per Nelson*, J., in Heacock *v.* Sherman, 14 Wend. 58, 1835; 13 Co. 33; 1 Bac. Ab. tit. "Bridges," 535, note; 2 East, 342; 5 Burr. 2594; 13 East, 220; Woolrych on Ways and Bridges, 202, 204, and cases; 1 Salk. 359; 2 Blacks. 687. How long this obligation continues, where bridges become *useful* to, and are generally *used* by, the public, see 14 Wend. 58, *supra.* As to the repair, by the public, of bridges originally built by private persons, see also Bisher *v.* Richards, 9 Ohio St. 495, 502, *per Gholson*, J.; State *v.* Campton, 2 N. H. 513; Dygert *v.* Schenk, 23 Wend. 446; Sampson *v.* Goochland, &c. 5 Gratt. (Va.) 241; Monmouth *v.* Gardiner, 35 Maine, 247; Railroad Company *v.* Duquesne, 46 Pa. St. 223; Smoot *v.* Wetumpka, 24 Ala. 112, 1854; Indianapolis *v.* McClure, 2 Ind. 147, 1850. Powers and duties of cities in respect to bridging canals which intersect their streets: Korah *v.* Ottawa, 32 Ill. 121; Joliet *v.* Verley, 35 Ill. 58; Towles *v.* Justices, 14 Geo. 391; Turnpike Company *v.* Berry, 5 Ind. 286, 1850. No common law obligation on canal

§ 580. An incorporated town, being charged with the control over its streets and the duties to improve the same, may legitimately contract for the *construction of free bridges* over a stream dividing its streets, and issue its warrants or bonds to raise money to be so invested. But such corporation has no power to execute a deed of trust conveying a bridge erected by the corporation to trustees, authorizing the charging of tolls thereon, and pledging the bridge and the tolls collected thereon for the payment of the debt created for its construction.[1] A city corporation, invested with the ordinary powers over streets, was held to be authorized to provide for the construction of a free bridge across a river running through it, upon ground dedicated and set apart for a street, although the city was laid off on only one side of the river, but was approached from the other side by a road touching the river where the bridge was located.[2]

Limitations on the Right of Free Transit and Use.

§ 581. We have heretofore shown that the primary purpose of a street is for public passage and travel, and that unauthorized and illegal obstructions to its free use come within the legal notion of a nuisance. But it is not every obstruction, irrespective of its character or purpose, that is illegal, even although not sanctioned by any express legislative or municipal authority. On the contrary, the right of the public to the

company to bridge a highway laid out subsequent to making of canal: Canal Company *v.* State, 4 Zabr. (N. J.) 62. Municipal power to protect: Hooksett *v.* Amoskeag, &c. Company, 44 N. H. 105; Korah *v.* Ottawa, 32 Ill. 121, 1863; Troy *v.* Railroad Company, 3 Fost. (N. H.) 83, 1851; Freedom *v.* Ward, 40 Maine, 383; County Commissioners *v.* Holcomb, 7 Ohio, pt. I. 232; Calais *v.* Dyer, 7 Greenl. (Me.) 155; Andover *v.* Sutton, 12 Met. 182; Monmouth *v.* Gardner, 35 Maine, 247. *Ante*, p. 519, n.

[1] Mullarky *v.* Cedar Falls, 19 Iowa, 21, 1865; Dively *v.* Cedar Falls, 27 Iowa, 227; Clark *v.* Des Moines, 19 Iowa, 199; Chicago *v.* Powers, 42 Ill. 169.

[2] Dively *v.* Cedar Falls, 27 Iowa, 227. But not a toll bridge: *Ib.*; Mullarky *v.* Cedar Falls, 19 Iowa, 21; Bell *v.* Foutch, 21 Iowa, 119; Barrett *v.* Brooks, *ib.* 144. *Ante*, Sec. 580.

A municipal corporation can not, without express authority, erect a *toll bridge and levy and collect tolls:* Clark *v.* Des Moines, 19 Iowa, 198; Colton *v.* Hanchett, 13 Ill. 615, 1852.

free and unobstructed use of a street or way is subject to reasonable and necessary limitations. The carriage and delivery of fuel, grain, goods, &c., are legitimate uses of a street, and may result in a temporary obstruction to the right of public transit. So the improvement of the street or highway itself may occasion impediments to its uninterrupted use by the public. And so of the improvement of adjoining lots by digging cellars, by building, &c.; this may occasion a reasonable necessity for using the street or sidewalk for the deposit of material. Temporary obstructions of this kind are not invasions of the public easement, but simply incidents to, or limitations of, it. They can be justified only when, and only so long as they are, *reasonably necessary*. There need be no *absolute* necessity; it suffices that the necessity is a *reasonable* one. But this will never justify the leaving of the street or way in an unsafe and dangerous condition, or its use in an unreasonable manner or for an unreasonable time.[1]

[1] Angell on Highways, Chap. VI.; Hawk. P. C. Chap. LXXVI. Sec. 49; Clark *v.* Fry, 8 Ohio St. 358, 373, 1858, *per Bartley*, C. J., *arguendo;* People *v.* Cunningham, 1 Denio (N. Y.), 524; Rex *v.* Jones, 3 Campb. 231; O'Linda *v.* Lothrop, 21 Pick. 292, 1838; Rex *v.* Ward, 4 Ad. & El. 405, relating to a hoard erected for repairing a house; Rex *v.* Russell, 6 Barn. & Cress. 566, as to temporary acts of loading coals in keels; Rex *v.* Cross, 3 Campb. 226; Rex *v.* Jones, 6 East, 230.

In Commonwealth *v.* Passmore, 1 Serg. & Rawl. 217, the Supreme Court of Pennsylvania, speaking of this subject, says: "*Necessity* justifies actions which would otherwise be nuisances; this necessity need not be absolute — it is enough if it be reasonable. No man has a right to throw wood or stones into the street at pleasure. But inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, brick, lime, sand, and other materials, may be placed in the street, provided it be done in the most convenient manner," and be not unreasonably prolonged. Approved, People *v.* Cunningham, 1 Denio (N. Y.), 524, 530; Clark *v.* Fry, 8 Ohio St. 358, 374; Rex *v.* Cross, 3 Campb. 226; St. John *v.* New York, 3 Bosw. (N. Y.) 483. In Wood *v.* Mears, 12 Ind. 515, 1859 (an action for special damages against the author of the obstruction), it was held a street of a city may be obstructed by placing material for building in it for a reasonable time and so as to occasion the least inconvenience, if, *from want of room elsewhere, it be reasonably necessary to deposit it in the street;* and a plea is defective which does not aver or show this reasonable necessity, as it cannot be judicially inferred from the fact that the building was being erected in a populous city. Undoubtedly, a man in the pursuit of his lawful business will be excused for acts which, if wantonly

§ 582. As a city corporation may be compelled to pay damages caused by the negligent manner in which persons may use or occupy the sidewalks and streets with *building material*, it may impose reasonable conditions on those who wish thus to use or occupy the streets and sidewalks—as, for example, require them, by ordinance, to give bond to indemnify the city against losses or damages caused by the manner in which the privilege to use and occupy the sidewalks and street is exercised.[1]

§ 583. A city council having "exclusive power over streets," has the right to determine, by ordinance, to what extent, and under what circumstances, they may be incumbered with *building materials*, and such an ordinance will protect parties acting under it, not only from a prosecution by the city, but from actions by third persons, when such actions are not grounded upon the negligence of the defendant.[2]

§ 584. Authority by the charter to a municipal council to make "salutary and needful by-laws," authorizes an ordinance

done, would be regarded as nuisances, yet no considerations of private interest or convenience will justify a person in the pursuit of his business unreasonably to incommode the public or interfere with their right to the free use of the street: Angell on Highways, Sec. 231. The law on this point is well stated by the court in Rex *v.* Russell, 6 East, 427: "That the primary object of the street is for the free passage of the public, and any thing which impeded that free passage, *without necessity*, was a nuisance. That if the nature of the defendant's business were such as to require the loading and unloading of so many more of his wagons than could be conveniently contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot." Same principle applied to congregation of *carts in the public streets* for the reception of slops from a distillery: People *v.* Cunningham, 1 Denio (N. Y.), 524. To the keeping of *coaches at a stand* in the street, waiting for passengers: Rex *v.* Cross, 3 Campb. 226. To a *timber merchant* depositing timber in the street; Rex *v.* Jones, 6 East, 230. And see, also, Rex *v.* Carlisle, 6 Carr. & P. 636; Rex *v.* Moore, 3 B. & Ald. 184.

Moving building on suitable streets, with expedition and care, is permissible: Graves *v.* Shattuck, 35 N. H. 257.

[1] McCarthy *v.* Chicago, Supreme Court Ill. May, 1870.

[2] Wood *v.* Mears (action against builder for injuries caused by building materials deposited in street), 12 Ind. 515, 1859; distinguished, Ball *v.* Armstrong, 10 *ib.* 181. *Supra*, Sec. 581, n.

prohibiting the obstruction of any street for the purpose of building "without the written license of the mayor *and aldermen;*" and under such an ordinance an agreement made in consideration of such license from the mayor *alone* is void, and no action lies thereon.[1]

§ 585. The owners of lots bordering upon streets or ways have, or may have, in other respects, a right to make a *reasonable and proper use* of the street or way. What may be deemed such a use depends, in the absence of legislative or authorized municipal declaration, much upon the local situationb and pulic usage — that is, the use which others similarly situated make of their land — this being evidence of a reasonable use.[2] Conformably to these principles, it was held that common and well established usage in the city of Boston justified the owners of land in erecting thereon, but on the line of the street or way, warehouses with *doors and windows opening upon the way or street*, and shutters projecting into the same, when open, and with sidewalks in front, having on their surface *iron gratings* for admitting light to, and *trap doors* for communicating with, the cellar or underground apartments of the warehouses, and used for putting in and taking out goods.[3] So, for the same reasons, it is not an unreasonable use of a street in a populous place, where land is valuable, so to erect structures as that the *gates and doors*, when opened, swing over the line of the street. Whatever may be the rights of the public, certain it is that these acts do not constitute a trespass upon the owner of the soil of the street.[4]

[1] Lowell *v.* Simpson, 10 Allen, 88, 1865.

[2] O'Linda *v.* Lothrop, 21 Pick. 292, 297, 1838; Gerard *v.* Cook, 2 Bos. & Pul. 109, 1806; Underwood *v.* Carney, 1 Cush. 285, 292, 1848, *per Forbes*, J.

[3] Underwood *v.* Carney, 1 Cush. 285, 1848; 21 Pick. 297, *supra*. As to liability of city for these openings, if unsafe and dangerous, see Bacon *v.* Boston, 3 Cush. 174, 1849; Lowell *v.* Spaulding, 4 *ib.* 275.

[4] O'Linda *v.* Lothrop, 21 Pick. 292, 1838. *Supra*, Sec. 538, *et seq.* Very recently, *Paxon*, J., of the Common Pleas Court in Philadelphia, in Philadelphia *v.* Presbyterian Board of Publication, held that where the ashlar or true line of a building conformed strictly to the line of the street, but the ornamental parts encroached on it, an injunction would not be granted to restrain the erection of such building, especially as this has been the custom for years in Philadelphia, and councils have not legislated on the subject: 29 Leg. Int. 53. *Supra*, Sec. 521.

CHAPTER XIX.

Municipal Taxation and Local Assessments.

§ 586. We have elsewhere had occasion to refer to the *subject of taxation* in relation to the powers and duties of municipalities.[1] It is chiefly in virtue of this power that the revenues are acquired by which municipal expenses are borne, and debts and liabilities paid. And it is, as we shall presently see, by virtue of a branch of this great power that local assessments upon property benefited, or legislatively declared or supposed to be benefited, are imposed, in order to pay the expense of making local improvements of a public nature within the municipality, adjoining or near the property assessed. It does not belong to the present work to treat at length of the power of taxation by the state and the limitations upon it. We shall confine ourselves to a consideration of the subject as connected with municipal corporations, and to the peculiarities which are impressed upon the power when exercised by municipalities, under authority conferred upon them by the legislature.[2]

§ 587. The *taxing power of the state* consists in its authority to levy and collect taxes, and assessments, which are in the nature of special taxes; and *taxes* (including, in the term, assessments) are burdens or charges imposed by the legislature, or under its authority, upon persons or property, to raise money for *public*, as distinguished from *private*, *purposes*, or to accomplish some end or object *public in its nature*. There can be no legitimate taxation to raise money unless it be destined for the

[1] *Ante*, Chap. I. p. 18, note; Chap. II. p. 39, Sec. 13; Chap. IV. p. 78, Sec. 34; p. 79, Sec. 35; p. 80, Sec. 36; p. 86, Sec. 41; p. 90, Sec. 44; Chap. V. p. 112, Sec. 64; p. 113, Sec. 65; chapter on Mandamus, *post*.

[2] The constitutional aspects of the subject have been well treated, both by Mr. Sedgwick (Statutory and Const. Law, Chap. X.) and by Judge Cooley (Const. Lim. Chap. XIV.) Mr. Blackwell's treatise on the subject of tax titles is well known to the profession, and Chap. XXXI. of that work is upon the subject of tax sales by municipal and other corporations.

uses or benefit of the government or of some of its municipalities, or divisions invested with the power of auxiliary or local administration. A public use or purpose is of the essence of a tax.[1] Theoretically, the tax-payer is compensated for the taxes he pays in the protection afforded to him and his property by the government which exacts the tax; but the substantial foundation of the power is political, civil, or governmental necessity, and taxes are largely, if not wholly, as Mr. Mill contends, sacrifices for the public good, "equality of sacrifice" being the rule dictated by justice.[2] Equality, indeed, so far as practicable, is inherent in the very idea of a *tax*, as distinguished from an arbitrary exaction, and in many of the states is enjoined, as we shall presently perceive, by constitutional provision.

§ 588. Whatever limitations exist upon the legislative authority to wield, in its full scope, the taxing power of the state at its will, must be sought in the nature of the power itself, as thus briefly explained, and in express or implied restrictions of the national and state constitutions.[3] Taxation implies, as

[1] Hanson *v.* Vernon, 27 Iowa, 28, 47, 1869, and see authorities there cited, defining *taxes;* People *v.* McCreery, 34 Cal. 432; Warren *v.* Henly, 31 Iowa (not yet reported), *per Beck,* J.; S. C. 5 West. Jurist, 101.

"I concede," says *Black,* C. J., in Sharpless *v.* Philadelphia, 21 Pa. St. 147 167, "that a law authorizing taxation for any other than public purposes is void. * * * A tax for a *private* purpose is unconstitutional, though it pass through the hands of public officers." A tax for a private purpose, says *Lowe,* J., in the Case of Wapello County, 13 Iowa, 405, is "a solecism in language." What is a *public purpose* sufficient to support the power, has been much discussed of late years, particularly in connection with the authority conferred upon municipalities to aid in the building of railways: See Chap. VI. *ante,* p. 144, *et seq.;* Cooley, Const. Lim. Chap. XIV. 487, *et seq.*

[2] Mill, Political Economy, Vol. II. pp. 370, 372; Warren *v.* Henly, 31 Iowa; S. C. West. Jurist, Vol. V. p. 101, opinion of *Beck,* J.

[3] Subject to constitutional restrictions, if any there be, in the particular state, it is within the *power of the legislature* of a state to ascertain the public burdens to be borne and the persons or classes of persons who ought to bear them, and its determination is not judicially reviewable. *Ante,* Chap. IV. pp. 89, 90, 92, and the authorities there cited; People *v.* Mayor, &c. of Brooklyn, 4 N. Y. (4 Comst.) 419, 1851; followed in Brewster *v.* Syracuse, 19 N. Y. 116, 118, 1859; in Sun Insurance Company *v.* The Mayor, &c. 8 N. Y. 241, 251; in Town of Guilford *v.* Supervisors, &c. 13 N. Y. (3 Kern.) 143; in Litchfield *v.* Vernon, 41 N. Y. 123, 1869; and in Scovill *v.* Cleveland, 1 Ohio

we have seen, an imposition for a *public* use; and it also implies that the imposition shall be upon some system of *apportionment*, so as to secure uniformity among those who are, or ought to be, subject to the particular tax or assessment; and hence we may readily conceive of acts of the legislature demanding sacrifices of the citizen which could not be sustained as legitimate exercises of the taxing power, although no specific provision of the constitution should be infringed. But where the imposition is properly a tax, and no specific or express constitutional limitation exists, the power of the legislature is supreme, and without any theoretical bounds. "If the right to impose a tax exists," says the Supreme Court of the United States,[1] "it is a right which, in its nature, acknowledges no limit;" and the reason is, that the needs of the public or of the government can ordinarily have no bounds set to them. Unless, therefore, there is some limit fixed in the constitution, the state may tax the property within the state to its full value; in other words, it has unlimited power over the *rate* of taxation and the *objects* (the property subject to be taxed) of taxation.

§ 589. The power of *taxation* and the power of *eminent domain*, subject to both of which all private property is held, although they both originate in political necessity, are in their

St. 127, 135, 1853; Warren *v.* Henly, 31 Iowa (not yet reported), *per Beck*, J; De Pauw *v.* New Albany, 22 Ind. 204, 1864; North Missouri Railroad Company *v.* Maguire, Supreme Court of Missouri, 1872 (not yet reported).

The legislature, in the exercise of the taxing power, may impose a tax to build a bridge, or to pay debts incurred for one already constructed, for the public accommodation; and the legislature (in the absence of constitutional restriction upon its power) may define how large that local community shall be, that is made subject to the tax, whether the state, or a county, or a city, or one or more of its wards: Shaw *v.* Dennis, 5 Gilm. (Ill.) 416; Philadelphia *v.* Field, 58 Pa. St. 320, referred to, *ante*, p. 90, Sec 43. If there be no special restriction on the legislature, it may create taxing districts without reference to existing civil or political districts: Shelby County *v.* Railroad Company, 5 Bush (Ky.), 225. *Ante*, Chap. IV. *passim*. Authority to tax property outside of corporate limits, to pay bonds issued in aid of a railroad, sustained: Langhorne *v.* Robinson, 20 Gratt. (Va.) 661. But in Wells *v.* City of Weston, 22 Mo. 384, 1856, it was held that the legislature cannot constitutionally authorize a municipal corporation to tax, for its own local purposes, lands lying beyond the limits of the corporation.

[1] Weston *v.* Charleston, 2 Pet. (U. S.) 449; McCullough *v.* Maryland, 4 Wheat. 316, 431; Hanson *v.* Vernon, 27 Iowa, 28, 49, 1869.

nature materially different. For taxes paid or money exacted under the taxing power, no direct specific compensation is made; but where property is *taken* under the right of eminent domain, this can be done, as we have already seen, only to the limited extent required by the particular object or enterprise in favor of which it is exercised, and then only on the condition of making to the owner direct and full compensation in money for the *particular* and *unequal* sacrifice which he would otherwise be obliged to make for the public benefit. Most of the courts have concurred in the view that the usual constitutional provision, prohibiting the taking of private property for public use without compensation, is a limitation on the exercise, by the state, of the right of eminent domain, and is not a limitation on the taxing power.[1]

§ 590. In the general power of the legislature, as well as in its power to create municipal corporations,[2] may be found the right to authorize them, when created, *to impose or levy local rates, taxes, or assessments* upon their inhabitants, and upon all property within the limits of the designated taxing district, which is ordinarily co-extensive with the territorial limits of the municipality.[3] Indeed, it is one of the distinguishing fea-

[1] People *v.* Mayor, &c. of Brooklyn, 4 N. Y. (4 Comst.) 419, 1851 The difference between *taxation* and *eminent domain* is here discriminated with great clearness and precision in the learned opinion of Mr. Justice *Ruggles.* Adhered to and followed: Litchfield *v.* Vernon, 41 N. Y. 123, 1869. See, also, Gilman *v.* Sheboygan, 2 Black (U. S.), 510, 1862; Moale *v.* Baltimore (opening street), 5 Md. 314, 1854. *Ante,* Chap. XVI. on Eminent Domain; Hanson *v.* Vernon, 27 Iowa, 28, 54, 1869; Williams *v.* Detroit, 2 Mich. 565; Railroad Company *v.* Connelly, 10 Ohio St. 165.

[2] *Ante,* p. 52, Sec. 17; p. 67, Sec. 27.

[3] Hope *v.* Deaderick, 8 Humph. (Tenn.) 1, 1847; Godden *v.* Crump, 7 Leigh (Va.), 120; Bull *v.* Read, 13 Gratt. (Va.) 78, 98, 1855; Thompson *v.* Floyd, 2 Jones (North Car.), Law, 313, 316; Wilmington *v.* Roby, 8 Ire. (North Car.) Law, 250, 1848; Alexander *v.* Baltimore, 5 Gill (Md.), 383, 393, 1847, *per Martin,* J.; Burgess *v.* Pue, 2 *ib.* 11; S. C. *ib.* 254, 1844; Intendant *v.* Chandler, 6 Ala. 899; Estabrook *v.* State, *ib.* 653; Battle *v.* Mobile, 9 *ib.* 234. *Supra,* p. 558, n.

"The state has an undoubted power to tax persons and property within its limits, and it may delegate such power to a civil corporation, so far as it may be necessary for the good government of the corporation:" Harrison *v.* Vicksburg, 3 Sm. & Marsh. (Miss.) 581, *per Sharkey,* C. J.; Smith *v.* Aberdeen, 25 Miss. 458.

tures of our municipal institutions, that local rates shall be locally imposed by those who have to pay them or bear their burden; and this power, from very early periods, has, in the different states, been constantly delegated to, and exercised by, the local authorities.[1]

In the absence of special constitutional restriction, the legislature may *confer the taxing power upon municipalities* in such measure as it deems expedient; in other words, with such limitations as it sees fit, as to the rate of taxation, the purposes for which it is authorized, and the objects (that is, the property) which shall be subjected to taxation; but it cannot, of course, confer any greater power than the state itself possesses, and must observe the restrictions and limitations of the organic law.[2]

§ 591. The power of the states and their municipalities to levy taxes is subject to certain express and implied restrictions in the *Federal Constitution*, which may be here briefly mentioned. Thus states cannot, without the consent of congress, lay any *imposts or duties on imports or exports* except what may be absolutely necessary for executing their inspection laws; nor can they, without the consent of congress, lay any duty on *tonnage*, as they are expressly prohibited from so doing by the constitution.[3] Nor does the power of taxation by the states

[1] Caldwell *v.* Justices, &c., 4 Jones (North Car.) Eq. 323, 1858, *per Ruffin*, J., quoted *ante*, pp. 18, 19, note; Burgess *v.* Pue, above cited.

[2] Alexander *v.* Baltimore, 5 Gill (Md.), 383, 393, 1847, *per Martin*, J.; Primm *v.* Belleville, Illinois Supreme Court, April, 1872.

"The state cannot authorize a municipal corporation to impose a tax which she herself would have no right to levy:" O'Donnell *v.* Bailey, 24 Miss. 386, 1852. A *city corporation* cannot tax a bank wholly owned by the *tate*, though there be no express provision exempting the property of the bank from taxation: Mayor *v.* Bank of Tennessee, 1 Swan (Tenn.), 269. Nor can it tax the *public property* of a *county* situate within the limits of the municipality: Piper *v.* Singer, 4 Serg. & Rawle (Pa.), 354. Construction of special constitutional provision requiring the legislature to *restrict* the power of taxation of incorporated towns and cities: *Ante*, p. 67, Sec. 27.

[3] See *ante* p. 117, Sec. 67, and cases cited.

As to passenger tax: Smith *v.* Turner, 7 How. (U. S.) 283, 1849; Smith *v.* Marston, 5 Texas, 426; State *v.* Fullerton, 7 Rob. (La.) 210, 1844; Norris *v.* Boston, 4 Met. 282; Rabassa *v.* Mayor, 1 Martin (La.) 484; 10 Am. Law Reg. (N. S.) July, 1871; Crandall *v.* Nevada, 6 Wall. 35. *Ante*, p. 117, n.

extend to the *instruments of the federal government*, nor to the *constitutional means* employed by congress to carry into execution the powers conferred in the Federal Constitution.[1] Taxes may be imposed by a state on all sales of merchandise or property made within the state, whether the goods sold were the produce of the state imposing the tax, or of some other state, provided the tax imposed is *uniform*, but a tax discriminating against the commodities of the citizens of the other states of the Union would be inconsistent with the provisions of the Federal Constitution, and a law imposing such a tax would be unconstitutional and invalid.[2] And the Supreme Court of the United States has recently decided that an act of the legislature of Maryland levying *discriminating taxes against non-residents of the state* was void (reversing the judgment of the Court of Appeals of Maryland), because repugnant to the provision of the Federal Constitution, which guarantees to the citizens of each state all the privileges and immunities of the citizens of the several states.[3]

[1] McCulloch *v.* Maryland, 4 Wheat. 316, 424; Weston *v.* Charleston, 2 Pet. (U. S.) 449, 1829, reversing S. C. Harper (South Car.), 219; National Bank *v.* Commonwealth, 9 Wall. 353; Osborn *v.* Bank of the United States, 9 Wheat. 738; Thompson *v.* Pacific Railroad, 9 Wall. 579; Union Pacific Railroad Company *v* Lincoln County, 1 Dillon, C. C. R. 314, 1871.

[2] Woodruff *v.* Parham, 8 Wall. 139; Hinson *v.* Lott, *ib.* 151; Ward *v.* Maryland, 12 Wall. 418, 1870, *per Clifford*, J.; Wiley *v.* Parmer, 14 Ala. 627.

[3] Ward *v.* Maryland, 12 Wall. 418, 1870; (S. C. in state court: Ward *v.* State, 31 Md. 279.) Giving the judgment of the court, *Clifford*, J., observed: "Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation, to acquire personal property, to take and hold real estate, to maintain actions in the courts of the state, and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens: Cooley, Const. Lim. 16; Brown *v.* Maryland, 12 Wheat. 449. Comprehensive as the power of the states is to lay and collect taxes and excises, it is nevertheless clear, in the judgment of the court, that the power cannot be exercised to any extent in a manner forbidden by the constitution; and inasmuch as the constitution provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states,

§ 592. In this connection, it will be convenient to notice some specific *state constitutional provisions* in their bearing upon the subject of taxation and local assessments by municipal corporations. The late constitution of *Illinois* contained a provision that "The corporate authorities of * * * cities * * may be vested with power to assess and collect taxes for corporate purposes." It was held by the Supreme Court that

it follows that the defendant might lawfully sell, or offer or expose for sale, within the district described in the indictment, any goods which the permanent residents of the state might sell, or offer or expose for sale, in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents: State *v.* North *et al.* 27 Mo. 464; Fire Department *v.* Wright, 3 E. D. Smith, 478; Paul *v.* Virginia, 8 Wall. 177." *Bradley*, J., regarded the act of the Maryland legislature as being also in violation of the commerce clause of the constitution.

In sustaining the validity of a corporation tax on sales of produce within the limits of the city by flat-boat traders, Mr. Chief Justice *Sharkey* observes: "The ordinance imposed no tax for the privilege of introducing the article, but a tax on the amount of sales. The power of a state to tax the merchandise of its own citizens has never been questioned, nor can it be. When a citizen of Ohio comes into this state, and makes sales of his merchandise here, there can be no reason why he should be exempted from the operation of the state laws. This position, carried to its utmost extent, would defeat the power of the state over all sales of merchandise within its territory; it would only be necessary for the merchant to claim a residence in some other state, and the power of the state would be at an end:" Harrison *v.* Vicksburg, 3 Sm. & Marsh. (Miss.) 581, 586, 1844.

The legislature, if it does not make discriminations in violation of the state constitution, may authorize municipal corporations to tax transient traders or itinerant dealers and pedlars; and such tax is not in violation of the constitution of the United States, although the property be brought from another state, provided, it must be added, it does not unlawfully discriminate in favor of the resident, and against the non-resident, citizen: Wynne *v.* Wright, 1 Dev. & Bat. (North Car.) Law, 19, 1834; Cowles *v.* Brittain, 2 Hawks (North Car.), Law and Eq. 204; Wilmington *v.* Roby, 8 Ire. (Law) 250, 1848; Whitfield *v.* Longest, 6 *ib.* 268; Plymouth *v.* Pettijohn, 4 Dev. 591; Corfield *v.* Coryell, 4 Wash. C. C. 380; State *v.* City Council, 10 Rich. (South Car.) Law, 240, 1857; State *v.* Pinckney, *ib.* 474; City Council *v.* Ahrens, 4 Strob. (South Car.) 241; Keller *v.* State, 11 Md. 525, 1857; Ward *v.* Morris, 4 H. & McH (Md.) 340; Ward *v.* Maryland, 31 Md 279; reversed, Ward *v.* Maryland, 12 Wall. 418, 1870; Oliver *v.* Washington Mills, 11 Allen, 268; State *v.* North, 27 Mo. 464; Wiley *v.* Parmer, 14 Ala. 627.

Taxation of *foreign corporations* doing business in the state permissible, though similar local corporations are not subject to the same tax: Commonwealth *v.* Milton, 12 B. Mon. 212; Slaughter's Case, 13 Gratt. (Va.) 767; Tatem *v.* Wright, 3 Zabr. (N. J.) 429; Paul *v.* Virginia, 8 Wall. 168, 1868.

this provision had the effect to limit taxation by municipalities to local or corporate purposes; and also to restrict the legislature from granting the right of local or corporate taxation to any other than the corporate authorities of the municipality or place to be taxed.[1]

The constitution of *Arkansas* provides that "all property shall be taxed according to its value, the manner of ascertaining which to be as the general assembly shall direct, making the same equal and uniform throughout the state. No one species of property shall be taxed higher than another species of property of equal value. The general assembly shall have power to tax merchants, hawkers, pedlars, and privileges in such manner as may be prescribed by law." Respecting the effect of these provisions, the Supreme Court, after reviewing the previous adjudications, which were not in all respects uniform, finally decided that the constitution did not prohibit the legislature "from *authorizing counties* and *incorporated towns* to impose a tax upon billiard tables, ten-pin alleys, taverns, groceries, and the like, for municipal purposes, and as a police regulation for the preservation of good order; that these provisions of the constitution apply to *state* revenue, and are not applicable to taxes levied for county [and city] purposes."[2]

§ 593. The constitution of *Ohio*, in substance, requires "the taxing" by the legislature of "all property by an uniform

[1] Constitution of Illinois, Art. 9, Sec. 5; Howard *v.* Drainage Company, 51 Ill. 130; *ante*, p. 88, Sec. 43; Primm *v.* Belleville, Illinois Supreme Court, April, 1872. Under this provision of the constitution, it was held that a city could not be compelled to incur debts and issue its bonds without the consent of the corporate authorities. In the case of Lincoln Park, the commissioners were created by the legislature, and were not under the control of the corporation, and had the power to make purchases of lands for the park; and to pay for such purchases, the city was to issue to them its bonds. The court held that they were not the *corporate authorities* of the city, and refused a *mandamus* to the city authorities to issue the bonds: People *v.* Chicago, 51 Ill. 17. But where the people of the corporation accept or adopt the act, and thereby make the commissioners corporate authorities, they may be vested with the power to assess and collect taxes: People *v.* Salomon, 51 Ill. 37. See, also, Howard *v.* Drainage Company, *supra;* Livingston *v.* Wider, 53 Ill. 302. *Infra*, Sec. 603.

[2] Washington *v.* State, 13 Ark. 752, 1853.

rule;" but, as construed, this provision does not necessarily exclude the right to tax that which is *not property*, nor does it cover the whole ground included within the limits of the taxing power.[1] An "assessment" is not "taxing," within the meaning of the constitution;[2] nor is the exacting by a municipality of money for granting a *license for shows and exhibitions* a "taxing of property," and hence, such exaction is not unconstitutional.[3] But although this constitutional provision does not apply to "assessments" it does apply to "all *taxes* either for state, county, township, or *corporation* purposes;" and it deprives the legislature of the plenary power it would otherwise have over the subject of taxation, and of the right (which it would otherwise possess) to make exceptions and exemptions. *All* property must be taxed.[4]

§ 594. A provision in the constitution of *Louisiana* declaring that "taxation shall be *equal and uniform throughout the state*," even if it extends to municipal taxation, is not violated by a legislative provision authorizing the taxation by municipalities of callings, trades and professions exercised within their limits; and taxation of this character is "*equal and uniform*" if all persons engaged in the same business are taxed alike.[5]

[1] Constitution of Ohio, Art. 12, Sec. 2; Zanesville *v.* Richards, 5 Ohio St. 589, 593, 1855; Baker *v.* Cincinnati, 11 Ohio St. 534, 541, *per Gholson*, J.; Bank *v.* Hines, 3 Ohio St. 1; Hill *v.* Higdon, 5 Ohio St. 243; *ib.* 520.

[2] Reeves *v.* Wood County, 8 Ohio St. 333; 9 *ib.* 520; Northern Railroad Company *v.* Connelly, 10 Ohio St. 159, and cases cited; People *v.* Mayor, &c. of Brooklyn, 4 N. Y. 419, 440.

[3] Baker *v.* Cincinnati, 11 Ohio St. 534; correcting and qualifying report in Mays *v.* Cincinnati, 1 *ib.* 268, 273.

[4] Zanesville *v.* Richards, 5 Ohio St. 589, 592, 1855, *per Ranney*, C. J.; Hill *v.* Higdon, *ib.* 243, 246.

[5] Merriam *v.* New Orleans (billiard tables), 14 La. An. 318; New Orleans *v.* Staiger, 10 *ib.* 68; New Orleans *v.* South Bank, 11 *ib.* 41; New Orleans *v.* Turpin (tax on auctioneers), 13 *ib.* 56, 1858; Municipality *v.* Dubois (special tax on livery stable keepers), 10 *ib.* 56; New Orleans *v.* Bank, *ib.* 735; Benton Street Case, 9 *ib.* 446. *Infra*, Sec. 600.

Whether the "equality" and "uniformity" of taxation required by the constitution extends to municipal taxation: Lynch *v.* Alexandria, 9 La. An. 498; Municipality, &c. *v.* White, *ib.* 446; Cumming *v.* Police Jury, *ib.* 503. But see later case of New Orleans *v.* Elliott (paving street), 10 *ib.* 59, and

§ 595. Unless there be some constitutional restriction, the legislature may authorize a municipality to levy and collect *retrospective taxes*, and for this purpose use the assessment rolls of a previous year.[1]

cases above cited. Street Case, 20 La. An. 497, 1868; Draining Company Case, 11 La. An. 338, 1856; Wallace *v.* Shelton (levee assessment), 14 La. An. 498; Municipality *v.* Dunn, 10 *ib.* 57; Same *v.* Guillotte, 14 *ib.* 297, 1859; State *v.* Volkman, 20 *ib.* 585. It is held that the constitutional provision quoted did not prohibit the legislature from authorizing a municipal corporation to require the payment of $500 as the price of a license for theatre exhibitions; the court putting its judgment on the ground that the exaction of a price for the license so granted was not, in the sense of the constitution, a *tax:* Charity Hospital *v.* Stickney, 2 La. An. 550, 1847; Municipality *v.* Duncan, *ib.* 182. In *Virginia*, it is considered that the constitutional requirement of equality and uniformity does not require the taxes on all licenses to be equal and uniform: Slaughter *v.* Commonwealth, 13 Gratt. (Va.) 767; Gilkerson *v.* Justices, &c. *ib.* 577. Construction of provision in the constitution of *Massachusetts* requiring taxation to be "reasonable and proportional:" Merrick *v.* Amherst, 13 Allen, 500. In this case it was held that the legislature might authorize a town to raise money by taxation for an agricultural college to be established therein: *Ib.* In *Pennsylvania* (whose constitution, however, contains no express provision requiring *equality* of taxation), an act of the legislature was held constitutional which compelled the property owners of the *county town* to contribute, in the way of taxes, $500 annually for several years, over and above the usual county rates and levies, to aid in defraying the expenses of erecting a court house and jail therein, then in process of erection: Kirby *v.* Shaw, 19 Pa. St. 258, 1852. See Schenley *v.* Allegheny, 25 *ib.* 128. Compare, Hammett *v.* Philadelphia, 65 Pa. St. 146. As to construction of provision requiring "the rule of taxation to be uniform, and to be levied upon such property as the legislature shall prescribe" (constitution of *Wisconsin*, Art. VIII. Sec. 1): Carter *v.* Dow (dog license tax valid), 16 Wis. 298, 566; Fire Department *v.* Milwaukee (foreign insurance company tax valid), *ib.* 136; Railroad Company *v.* Supervisors, 3 Am. Law Reg. 679; Weeks *v.* Milwaukee, 10 Wis. 242, 282; State *v.* Portage, 12 *ib.* 562; Bond *v.* Kenosha, 17 *ib.* 284; Dean *v.* Gleason, 16 *ib.* 116; Brightman *v.* Kirner, 22 *ib.* 54. And see Gilman *v.* Sheboygan, 2 Black (U. S.), 510; Muscatine *v.* Railroad Company, 1 Dillon, C. C. R. 536. Uniformity of taxation of corporations required by the *Iowa* constitution: Muscatine *v.* Railroad Company, *supra;* Davenport *v.* Railroad Company, 16 Iowa, 348, the opinion of *Wright* and *Dillon*, JJ., subsequently, in 1871, approved by a majority of the court, in a case not yet reported. And see Express Company *v.* Ellyson, 28 Iowa, 370, 380.

[1] Municipality *v.* Wheeler, 10 La. An. 745; New Orleans *v.* Poutz, 14 *ib.* 853. *Ante*, p. 92, Sec. 46. In Wisconsin it was held that an act passed in 1862 (made necessary to avoid difficulties growing out of previous unconstitutional taxation), providing for the re-assessment of taxes of 1854, '55, '56, and '57 in one of the cities of that state, was constitutional: Tallman *v.* Janesville, 17 Wis. 71, 1863.

§ 596. The expense of making *local improvements*, such as grading and paving or otherwise improving streets and sidewalks, constructing drains, sewers, and the like, is very generally met, in whole or in part, by *local assessments* authorized to be made upon persons or property thereby benefited, or supposed to be benefited. Legislation of this character, both in respect to its justice and its constitutional validity, has been extensively discussed by the judicial tribunals of perhaps nearly every state in the Union.[1] The courts seem to be very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. And the many cases which have been decided fully establish the general proposition that a charter or statute authorizing the municipal authorities to open or establish streets,[2] or to make local improvements of the character above mentioned, and to assess the expense upon the property which, in the opinion of the designated tribunal or officers, shall be benefited by the improvement, in proportion to the amount of such benefit, or upon the abutters in proportion to benefits or frontage or superficial contents, is, in the absence of some special constitutional restriction, a valid exercise of the power of taxation. Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the property benefited or legislatively declared to be benefited, and, if

[1] In holding that the legislature may constitutionally confer upon municipal corporations the power to improve streets at the expense of the adjoining proprietors, the Supreme Court of Missouri say: "The subject has been thoroughly discussed, and every principle bearing on it severely analyzed, in almost every state of the Union where the power has been exercised; and it is now as firmly established as any other doctrine of American law:" *Per Richardson*, J., in Palmyra *v.* Morton, 25 Mo. 593, 1857; see, also, in the same state, Egyptian Levee Company *v.* Hardin, 27 Mo. 495; St. Joseph *v.* O'Donoghue, 31 Mo. 345, 1861; Lockwood *v.* St. Louis, 24 Mo. 20, 1856; re-affirmed, St. Louis *v.* Clemens, 36 Mo. 467, 1865; and see authorities cited *infra*. Parliament has the power, and for a long time has exercised it, of assessing property for benefits conferred: Viner's Abr. "Sewers;" Comyn's Dig. "Sewers."

[2] As to apportioning *the damages* for opening streets *among the lots or property benefited*, see chapter on Eminent Domain, *ante*, Sec. 481, and authorities there cited.

in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, in all cases, a question of legislative expediency, unless there be some special restraining constitutional provision upon the subject.[1] Whatever limitation there is upon the power of taxation (which includes the power of apportioning taxation) must be found in the nature of the power, and in express constitutional provisions.[2]

[1] There has been much controversy upon the point whether it is more just that the adjacent property should bear the whole expense of sidewalks and other local improvement than that it should be borne by the corporation at large. See, for example, opinion of *Paine*, J., attacking (Weeks *v.* Milwaukee, 10 Wis. 258), and of *Beck*, J., defending, local assessments upon the abutters: Warren *v.* Henly, 31 Iowa, 1870 (not yet reported). See, also, Philadelphia *v.* Tryon, 35 Pa. St. 401; Lexington *v.* McQuillan's Heirs, 9 Dana (Ky.), 513; People *v.* Mayor, &c. of Brooklyn, 4 N. Y. 419. In Louisiana, the equitable, and, it seems to the author, just, rule is adopted, of compelling the owner of property to pay a portion (one-third) of the cost of improvements in front of it, and the residue to be paid by the municipality. In reference to this subject, *Slidell*, C. J., remarked: "I must repeat my conviction that the system of paying for local improvements wholly out of the general treasury is inequitable, and will result in great extravagance, abuse, and injustice. I think the system of making particular localities, which are specially benefited, bear a special portion of the burden, is safer, and more just to the citizens at large, by whose united contributions the city treasury is supplied. What is taken out of that treasury is taken out of the pockets of all the proprietors:" Municipality *v.* Dunn, 10 La. An. 57, 1855. See Municipality *v.* White, 9 *ib.* 447.

If the charter requires the assessment to be according to *benefits received*, it is not sufficient to assess according to *frontage*, and the report of the commissioners of assessment should show that the assessment was made upon the right basis: State *v.* Hudson, 5 Dutch. (N. J.) 104, 1860; Same *v.* Same, *ib.* 115; State *v.* Bergen, *ib* 266. Difference between "benefits" and "frontage:" State *v.* Hudson, *supra;* Clapp *v.* Hartford, 35 Conn. 66.

Construction of word "fronting."—Authority to pave a highway at the expense of the *fronting* thereon, does not authorize an assessment against a lot which is separated from the highway so paved, by a railway running side by side therewith, which is liable to be "fenced up at any moment." The court add: "We are unable, indeed, to see how it can be said that this lot fronts on the highway in question, when its real front is on another public highway—the railroad—forty-seven feet south of it:" Philadelphia *v.* Eastwick, 35 Pa. St. 75, 1860. See, also, Philadelphia *v.* Railroad Company, 33 *ib.* 41.

[2] People *v.* Mayor, &c. of Brooklyn, 4 N. Y. (4 Comst.) 419, 1851, which is the leading case on this subject. See chapter on Eminent Domain, Sec. 481. Speaking of the constitution of New York, in this respect, Mr. Justice

§ 597. Upon the kindred question, whether it is competent for the legislature to require the *abutter to bear the whole expense* of the improvement in front of his particular property,—in

Ruggles, in the case just cited, says: "It is not ordained (by the constitution) that taxation shall be general, so as to embrace all persons or *all* taxable property within the state, or *within any district* or territorial division of the state; nor that it shall or shall not be numerically equal, as in the case of a capitation tax; nor that it must be in the ratio of the value of each man's land, or of his goods, or of both combined; nor that a tax 'must be co-extensive with the district, or upon all the property in a district which has the character of, and is known to the law as, a local sovereignty.' Nor has the constitution ordained or forbidden that a tax shall be apportioned according to the benefit which each tax-payer is supposed to receive from the object on which the tax is expended. In all of these particulars, the power of taxation (in this state) is unrestrained:" 4 N. Y. 419, 427. The case of the People *v.* Mayor, &c. of Brooklyn, was recognized and followed in Brewster *v.* Syracuse, 19 N. Y. 116, 118; Guilford *v.* Supervisors, &c. 13 N. Y. (3 Kern.) 143; Sun Insurance Company *v.* Mayor, &c. 8 N. Y. 241, 251; Litchfield *v.* Vernon, 41 N. Y. 123, 1869; Howell *v.* Buffalo, 37 N. Y. 267, 1868. May be assessed against owner: Chapman *v.* Brooklyn, 40 N. Y. 372.

Not only can the legislature authorize, but it may, in the absence of any special restriction upon its power in this respect, *compel* a municipal corporation to *lay out and improve highways or streets* within its limits, without its consent or a vote of its citizens; and for this purpose it may provide for raising the money by a sale of the bonds of the municipality, due at a future period, and to be paid by *taxation;* and if the local authorities refuse to issue the bonds, the duty may be enforced by *mandamus:* People *ex rel.* McLean *v.* Flagg, N. Y. Court of Appeals, 11 Am. Law Reg. (N. S.) 80. See, also, *ante*, pp. 88–90, Sec. 43, and cases cited.

In *Pennsylvania*, local assessments on the property benefited are "clearly within the competency of the legislature"—are a legitimate exercise of the taxing power—and "have been many times sustained by this court:" *Per Woodward*, J., in Philadelphia *v.* Tryon, 35 Pa. St. 401, 404, 1860. See, in same state, O'Connor *v.* Pittsburg, 6 Harris, 187; Schenley *v.* Allegheny, 25 Pa. St. 128, 1854. See Kirby *v.* Shaw, 19 Pa. St. 258, as to Pennsylvania constitution, and the absence of any provision therein requiring *equality* of taxation: Comp. Hammett *v.* Philadelphia, *infra*. The assessment may be *upon the abutter*, "in proportion to the distance in feet which the property may abut" on the improvement: Pittsburg *v.* Woods, 44 Pa. St. 113, 1862, approves People *v.* Mayor, &c. of Brooklyn, *supra;* Magee *v.* Commonwealth, 46 *ib.* 358; Wray *v.* Pittsburg, 46 *ib.* 365 (this case refers to O'Connor *v.* Pittsburg, *supra*, and says the charter was altered after it was decided); McGonigle *v.* Allegheny, 44 Pa. St. 118. May be *made a lien* upon the property benefited: McMasters *v.* Commonwealth, 3 Watts (Pa.), 292, 1834; Greensburg *v.* Young, 53 Pa. St. 280, construing charter to authorize assessment upon the abutter; Stroud *v.* Philadelphia, 61 Pa. St. 255; Fenelon's Petition, 7 Barr, 175.

other words, whether the abutters can be made to pay the cost of the improvement in front of their respective lots — (instead of having the whole expense of the improvement assessed or

In Philadelphia *v.* Tryon, above cited, Mr. Justice *Woodward* thus vindicates the *justice* of such assessments: "Local impositions for grading, paving, sewerage, and the like," he says, "have been many times sustained by this court, and are, in the long run, perfectly fair, for they enter into and enhance the value of the property assessed. The public, it is true, are benefited, but so is the individual, and, as an owner of urban property, he is further benefited, when, in due time, the same tax falls on his neighbor:" 35 Pa. St. 401, 404, 1860. The foregoing cases in Pennsylvania should be read in the light of Hammett *v.* Philadelphia, 65 Pa. St. 146; S. C. 8 Am. Law Reg. (N. S.) 411. It is admitted, in this case, that municipalities may constitutionally be authorized to make *local* assessments to pay for *local* improvements, but it is denied that the legislature can authorize a local assessment to pay for an improvement not local, but made for the general or public benefit. Applying this principle, it was held that local assessments may be made for paving a street, but that when a street is once opened and paved, and is thus part of the highways of the city, the *re-paving* of it cannot be assessed on the adjoining lots, but is part of the general duty of the corporation. Compare, Lafayette *v.* Fowler, 34 Ind. 140; Williams *v.* Detroit, 2 Mich. 560, 1861; Hoyt *v.* East Saginaw, 19 Mich. 39; Municipality *v.* Dunn, 10 La. An. 57, 1855, cited *infra*.

The legislature may, in *Massachusetts*, authorize the cost of opening, widening, and grading streets to be assessed upon the estates that will abut on the street afterwards: Dorgan *v.* Boston, 12 Allen, 223.

In *Kentucky*, local improvements at the expense of the abutters or property benefited was first decided to be constitutional, in the case of Lexington *v.* McQuillan's Heirs, 9 Dana, 514, 1840, in which the subject is discussed with great fulness and ability by *Robertson*, C. J. See, also, Louisville *v.* Hyatt, 2 B. Mon. 177.

A statute authorizing a municipal corporation to direct any street opened by individuals on their own lands and dedicated to the public, to be graded and made fit for travel, and to assess the whole expense thereof on them, is not in conflict with any provision of the constitution of *New Jersey:* State *v.* Dean, 3 Zabr. (N. J.) 335, 1852; Holmes *v.* Jersey City, 1 Beasl. (N. J.) 264.

Power of local taxation for local purposes sustained, and the cases decided in *Virginia* on the subject, collected and referred to: Gilkerson *v.* Justices, 13 Gratt. (Va.) 577, 1856.

In *Maryland*, the Court of Appeals has declared the constitutionality of laws which impose all of the expenses or damages caused by opening a street upon those immediately benefited, instead of the community at large: Alexander *v.* Baltimore, 5 Gill (Md.), 383, 1847; followed, Moale *v.* Baltimore, 5 Md. 314, 1854. This last case expressly approved People *v.* Brooklyn, *supra*. See, also, Howard *v.* The Church, 18 Md. 451.

In *Mississippi*, it is also held that there is nothing in the constitution of that state which deprives the legislature of the power to impose a tax on a

apportioned among all, on the basis of frontage, or of benefits), there has been more diversity of opinion. In a case in Michigan involving this precise inquiry, the four judges then constituting the Supreme Court were equally divided in judgment.[1]

local district for the construction of local public improvements; and that municipal corporations may be constitutionally authorized to assess taxes upon lots for the purpose of making improvements upon the streets in front thereof: Williams *v.* Cammack, 27 Miss. (5 Cush.) 209, 224, 1854 (levee tax); following People *v.* Mayor, &c. of Brooklyn, *supra.* S. P. Alcorn *v.* Horner (levee tax), 38 Miss. 652, 1860; Smith *v.* Aberdeen, 25 Miss. 458, 1853. The objection that such a tax is not *equal and uniform*, the the court considered not to be well taken.

In *Ohio*, lot owners may be constitutionally required to drain and fill up their lots, and the power may be delegated to the municipal authorities. Legislation of this character is sustained as a legitimate exercise of the police power for the preservation of the public health: Bliss *v.* Kraus, 16 Ohio St. 54, 1864. As to *local assessments:* Creighton *v.* Scott, 14 Ohio St. 438; Scoville *v.* Cleveland, 1 Ohio St. 126, 1853; Cleveland *v.* Wick, 18 Ohio St. 303; Bliss *v.* Kraus, 16 Ohio St. 54, 1854.

In *South Carolina*, municipal corporations may constitutionally be authorized to levy taxes or assessments for the purposes of drains and pavements, and without the intervention of the jury: Cruikshanks *v.* City Council, 1 McCord (South Car.), 360, 1821.

That the legislature possesses the power, unless specially restrained, to require abutters or owners of property specially benefited to construct sidewalks or other local improvements, has also been decided in the following cases: White *v.* Mayor, 2 Swan (Tenn.), 364, 1852; Mayberry *v.* Franklin, 6 Humph. 368; Washington *v.* Mayor, &c. 1 Swan (Tenn.), 177; Warren *v.* Henly, 31 Iowa, 1870 (not yet published); S. C. 5 West. Jurist, 101; McGehee *v.* Mathis (levee tax), 21 Ark. 40, 1860; Nichols *v.* Bridgeport, 23 Conn. 189, 207, approving People *v.* Mayor, &c. of Brooklyn, *supra.* S. P. Cone *v.* Hartford, 28 Conn. 363, 374; State *v.* Portage, 12 Wis. 562; Indianapolis *v.* Mansur, 15 Ind. 112; Lafayette *v.* Fowler, 34 Ind. 140; Blanding *v.* Burr, 13 Cal. 343; Street Railway Appeal, 32 Cal. 499. Assessments on adjoining lots, for paving, held constitutional in the Detroit charter: Williams *v.* Detroit, 2 Mich. 560, 1853. See Woodbridge *v.* Detroit, 8 Mich. 274; Hoyt *v.* East Saginaw, 19 Mich. 39.

As to power to pave street occupied by a *plank road company* under legislative authority, and assess the amount upon the abutters: Bagg *v.* Detroit, 5 Mich. 336. *Turnpike road:* State *v.* New Brunswick, 1 Vroom (N. J.), 395 (a grading and paving assessment). Local assessment on *railroad property:* Railroad Company *v.* Connelly, 10 Ohio St. 159; Railroad Company *v.* Spearman, 12 Iowa, 112. *Supra*, p. 520, n.

[1] Woodbridge *v.* Detroit, 8 Mich. 274, 1860, *Martin*, C. J., and *Manning*, J., holding that the provision of the charter of Detroit authorizing the council to cause streets to be improved, and to assess the whole expense in front of each lot upon the lot, and make the same a lien thereon, was valid: *Camp-*

In Wisconsin[1] and in Iowa[2] the power of the legislature, in the absence of special restriction, to require local improvements to be made in this manner has been expressly adjudged, and in some, and perhaps most, of the other states the power has been conferred, and seems to have been exercised without being judicially questioned. It may be true that in some instances more hardship will be occasioned by requiring each owner to make or pay for the improvement in front of his own property, than if the cost were assessed on the basis of frontage or of supposed benefits received, still it seems to the author difficult to find satisfactory and solid grounds on which to discriminate the cases so as to hold that one is within the constitutional power of the legislature and the other is not.

§ 598. Whether the *constitutions* of the various states *do contain provisions which prohibit the legislature* from assessing the expense of local improvements upon the property in the vicinity has given rise to numerous decisions. In the leading case it was held, upon great consideration, in an opinion the reasoning and conclusion of which have been almost everywhere admitted to be sound, that legislation of this character did not contravene the constitutional provision that "no person shall

bell and *Christiancy*, JJ., *contra*. The discussions in the several opinions of the judges are very interesting and instructive. Mr. Justice *Cooley*, in his treatise, expresses a decided opinion against the constitutionality of such enactment, his ground of objection being that the requirement is arbitrary, and disregards the principles of uniformity and apportionment of burden: Cooley, Const. Lim. 508. See on general subject of constitutional power, Hoyt *v.* East Saginaw, 19 Mich. 39.

[1] Weeks *v.* Milwaukee, 10 Wis. 258. *Paine*, J., makes a strong argument against all local assessments on principle, but considers the right to make them as recognized by the constitution of the state, which requires the legislature, in organizing municipal corporations, "to restrict their power of taxation, *assessment*," &c. See *ante*, p. 67, Sec. 27.

[2] Warren *v.* Henly, 31 Iowa (not yet published); S. C. 5 Western Jurist, 101, 1870: In this case a provision of the charter of the city of Lyons, authorizing the city council to cause the streets to be paved and the pavement repaired, and to that end to require the adjacent owners to pave or repair one-half in width of the street contiguous to their respective lots, and in case of neglect, authorizing the city to do the work and assess the expense as a tax on the lots, was held not to be unconstitutional.

be deprived of life, liberty, or *property*, without due process of law; nor shall *private property* be taken for public use without just compensation."[1]

§ 599. The constitution of *California* requires that "*taxation* shall be *equal and uniform* throughout the state," and that "all property in the state shall be *taxed in proportion to its value.*" The word *taxation*, as here used, was held, by the Supreme Court of that state, to refer to general taxes to defray the ordinary expenses of the state and its subordinate local governments, and not to assessments for local improvements; that *taxation* was intended to be exercised upon the basis of value, so as to secure equality and uniformity; that *assessments* (although a branch of the taxing power) need not necessarily be exercised on the *ad valorem* principle, but the legislature is at liberty to adopt a different mode or basis of apportionment, such as frontage, benefits received, or superficial contents.[2]

[1] People *v.* Mayor, &c. of Brooklyn, 4 N. Y. (4 Comst.) 419, 1851.

[2] Constitution of California, Art. 11, Sec. 13; Emery *v.* Gas Company, 28 Cal. 345, 1865. The opinion of *Sawyer*, J., contains an exceedingly clear and able discussion of the subject, in the light of the adjudged cases. See, also, Hart *v* Gaven, 12 Cal. 476; Argenti *v.* San Francisco, 16 Cal. 255; People *v.* Railroad Co. 35 Cal. 606; Burnett *v.* Sacramento, 12 Cal. 76, 1859; Blanding *v.* Burr, 13 Cal. 343; Walsh *v.* Matthews, 29 Cal. 123. Compare Creighton *v.* Manson, 27 Cal. 613. "Uniformity" of assessment, and mode of ascertaining benefits: Street Railway Appeal, 32 Cal. 499, 1867. Right to assess street railway company as one of the parties benefited by local improvement: *Ib;* State *v.* Newark, 3 Dutch. (N. J.) 186; Taylor *v.* Palmer, 31 Cal. 240, 1866, as to making assessments a personal charge.

The constitutional provision mentioned in the text further construed: People *v.* Railroad Company, 35 Cal. 606; People *v.* McCreery, 34 Cal. 43. In the case last cited it is held that the power of the legislature over the whole subject of taxation, including the property to be charged, the amount of the tax, the mode of levying, assessing, and collecting it, etc., is as ample as over any other matter that is a proper subject of legislative action. The provisions of section thirteen, Article 11 of the constitution are limitations, and not grants of power; but as limitations, are, according to their terms, mandatory upon the legislature. And it is also held: first, that by the words "all property in this state" is meant all private property, or all property, other than that belonging to the United States or this state, or that which is public property; second, that the words "taxation shall be equal and uniform throughout the state," relate to taxation of property, and that the legislature has no power to exempt any private property in this state from taxation; and third, that the rate of taxation on

§ 600. So in *Louisiana*, according to the later, if not the earlier, cases, local municipal assessments for local improvements are valid, although the constitution provides that all *taxation* shall be equal and uniform throughout the state: such assessments are not *taxation* within the meaning of the constitution requiring uniformity of taxation.[1]

§ 601. So, in *Missouri*, assessments against adjacent owners for benefits received from the opening, &c., of streets are a valid exercise of the taxing power, and do not contravene the provision of the constitution "that all property subject to taxation shall be taxed in proportion to its value."[2]

§ 602. So a provision of the constitution of *Kansas*, under the title "Finance and Taxation," that "the legislature shall provide for a uniform and equal rate of *assessment* and taxation," and another section, under the title "Corporations," that "Provision shall be made by general law for the organization of cities, towns, and villages, and their power of taxation, *assessment*, &c., shall be so restricted as to prevent the abuse of such power," were held not to deprive the legislature of the power to authorize local improvements of streets to be charged upon the adjacent property. In the latter section, the word

property for state purposes shall be uniform throughout the state: People *v.* Coleman, 4 Cal. 46, and High *v.* Shoemaker, 22 Cal. 363, so far as in conflict herewith, are overruled. And see Beals *v.* Amador County, 35 Cal. 624. As to uniformity in wharfage and dockage duties: People *v.* Railroad Company, 35 Cal. 606. A tax on merchants graduated according to the amount of their sales is not unequal: Sacramento *v.* Crocker, 16 Cal. 119.

[1] Street Case, 20 La. An. 497, 1868, approving Draining Company Case, 11 La. An. 338, 1856, in which the power of the legislature to compel proprietors to make or pay for local improvements is considerately and fully examined, and it was even held by the majority of the court, that the legislature had the power to cause lands within the limits of a municipal corporation to be drained at the expense of the land benefited, through the intervention of a private corporation created for that purpose. See, also, Wallace *v.* Shelton, 14 La. An. 498 (levee assessments); Municipality *v.* Dunn, 10 La. An. 57; O'Leary *v.* Sloo, 7 La. An. 25; Municipality *v.* Guillotte, 14 *ib.* 297, 1859; Yeatman *v.* Crandall, 11 *ib.* 220 (levee assessments); Compare municipality *v.* White 9 *ib.* 446, 1864. *Supra*, Sec. 594.

[2] Garrett *v.* St. Louis, 25 Mo. 505, 1857, approving People *v.* Mayor of Brooklyn, *supra;* Lexington *v.* McQuillan's Heirs, 9 Dana (Ky.), 513.

"*assessment*" was construed to be used in its technical sense of a charge upon the adjacent property for improvements, and in the former section it was used in a different sense.[1]

§ 603. A legislative enactment in *Kentucky* incorporated a small suburban community, in the vicinity of a city, called "The District of Highlands," and authorized its trustees "to grade and pave, or macadamize with rock or gravel, any public road passing through or into said district, within the limits thereof; and, with the assent of two-thirds of the owners of the real estate through which any such road may pass, to levy special taxes on such real estate, to pay for such grading and paving or macadamizing." It was held that the act was constitutional, and that a levy of a tax, upon petition of the requisite number of land owners, on the land abutting the roads improved, rated by the number of acres of each owner's tract, approached equality as nearly as specific taxation might be expected to do, and hence could not be adjudged unconstitutional for unjust inequality.[2]

But, on the other hand, it should be stated that, in *Illinois*, it was held, under the special provisions of the late constitution, that special assessments made upon the sole basis of frontage were unconstitutional, as containing neither the element of "uniformity" nor "equality," which were regarded as essential to all taxation in that state, whether general or local.[3]

[1] Hines *v.* Leavenworth, 3 Kansas, 186, 1865. *Ante*, p. 67, Sec. 27.

[2] Malchus *v.* Highlands, 4 Bush (Ky.), 547.

[3] Chicago *v.* Larned, 34 Ill. 203, 1864, criticising and holding inapplicable, People *v.* Brooklyn, *supra*, and the decisions in other states which follow it: S. P. Ottawa *v.* Spencer, 36 Ill. 211, 1866. In view of the importance of the subject, and the undoubted fact that the reasoning of the court is opposed, as it would seem, to the general current of the decisions elsewhere, the special provision of the constitution, and the result reached, may be properly stated with some fulness. The constitution (Art. 9, Sec. 2) declared that the general assembly shall provide for levying a tax by valuation, so that all persons shall pay a tax in proportion to the value of their property. It also contained the following provision (Art 9, Sec. 5). "That the *corporate authorities* of counties, townships, school districts, *cities, towns, and villages* may be vested with *power to assess and collect taxes for corporate purposes;* such taxes to be *uniform in respect to persons and property within the jurisdiction of*

§ 604. In a previous chapter the subject of municipal authority over streets, and also over roads and highways within the corporate limits of municipalities, has been considered.[1] Special provision for *road or street labor* is not unfrequently made in charters; and unless there be some restrictive constitutional provision, the legislature may empower the municipal authorities to require the inhabitants to pay road taxes, or perform road labor, which is in effect a tax. Not only so, but the legislature has the constitutional power to authorize a city corporation to levy taxes or expend money to improve public roads outside of, but leading into, the city.[2] And the grant in the charter of a city of the power to require road labor from all male residents between certain ages is not an infringement

the body imposing the same." Also, the usual provision for compensation for private property taken for public use. By the revised charter of the city of Chicago it was empowered to grade, pave, and improve its streets, and to *assess the cost* upon *the real estate fronting* on the contemplated improvement. In the case of *Chicago* v. *Larned*, 34 Ill. 203, 1864, the question of the constitutionality of this part of the charter arose, and was discussed by counsel with great analytic power and research. The opinion of the Supreme Court was, that the provisions of the constitution were peculiar and more stringent than those in any other state (but in this respect, the court was probably mistaken); that the principles of "uniformity" and "equality" of taxation applied to local as well as general taxes — applied to special assessments as well as to taxes — and that a special assessment for a "Nicholson pavement," made on the basis of the *frontage* of lots on the streets, was invalid, as being neither equal nor uniform. The court was of opinion that such assessments could only be made by assessing to each lot the special benefits it will derive from the improvement, charging such benefit on the lots, the residue of the cost to be paid by equal and uniform taxation. The prior decisions in that state upon the subject are reviewed, and in effect, as it would seem to the author, overruled. In Ottawa *v.* Spencer, 40 Ill. 211, 1866, the same principle was adhered to and applied to a special assessment for building sidewalks: S. P. St. John *v.* East St. Louis, 50 Ill. 92, 1869. As to provisions of the new constitution of Illinois, and construction of Sec. 4, Art. IX. thereof, in relation to municipal taxes and assessments, see Webster *v.* Chicago, 1872, 4 Chicago Legal News, 116, not yet officially reported: Prim *v.* Belleville, *ib.* 227.

[1] *Ante*, Chap. XVIII. Secs. 534–537.

[2] Skinner *v.* Hutton, 33 Mo. 244, 1862. The legislature of the state has the power, unless expressly restrained by the constitution, to authorize a municipal corporation to levy a tax upon, or require a license from, persons using the paved streets of a city, for the purpose of keeping the same in repair: Chess *v.* Birmingham, 1 Grant (Pa.) Cas. 438, 1857. See Bennett *v.* Birmingham, 31 Pa. St. 15, 1850. *Ante*, Sec. 540.

of the provision of the state constitution, which requires "that the mode of levying a tax shall be by valuation, so that every person shall pay a tax in proportion to the value of his property," the court being of the opinion that this clause was intended to direct a uniform mode of taxing property, but not to deprive the legislature of the power to resort to other species of taxation if it saw fit to do so.[1] Power to the corporate authorities of a town "to make such rules, orders, regulations, and ordinances as to them shall seem meet for repairing streets," was held, in view of the general legislation on the same subject, to give authority to require the inhabitants compulsorily to labor on the streets for the purpose of repairing them, and this, although there was also express power (regarded by the court as cumulative), to levy a tax to be expended, among other purposes, for street repairs.[2]

§ 605. It is a principle universally declared and admitted, that municipal corporations can levy no taxes, general or special, upon the inhabitants or their property, unless the *power be plainly and unmistakably conferred.* It has, indeed, often been said that it must be specifically granted *in terms;* but all courts agree that the authority must be given either in express words, or by necessary implication, and that it cannot be collected by doubtful influences from other powers, or powers relating to other subjects, nor deduced from any consideration of convenience or advantage. It is important to bear in mind that the authority to municipalities to impose burdens of any character upon persons or property is wholly statutory, and as its exercise may result in a divestiture and transfer of property, it must be clearly given and strictly pursued. This rule applies, as we have already seen, to proceedings[3] by municipal corporations under the delegated right of Eminent Domain, and it extends equally to proceedings under the taxing power, including special assessments for local improvements.[4]

[1] Sawyer *v.* Alton, 3 Scam. (Ill.) 130.

[2] State *v.* Halifax, 4 Dev. Law (N. C.), 345, 1833.

[3] *Ante,* Chap. XVI. Sec. 470, *et seq.*

[4] Sharp *v.* Spier, 4 Hill (N. Y.), 76, 1843; Sharp *v.* Johnson, *ib.* 92; Mays *v.* Cincinnati, 1 Ohio St. 268, 1853; Beatty *v.* Knowles, 4 Pet. (U. S.) 152;

§ 606. Therefore, the *power to tax* (using the word in its strict and proper sense, as a means of raising municipal revenue) *cannot be inferred* from the general welfare clause in a charter;[1] nor is it usually to be implied from authority to license and regulate specified avocations;[2] nor from legislative au-

Dyckman *v.* Mayor, &c. of New York, 1 Seld. 434; Leavenworth *v.* Norton, 1 Kansas, 432, 1863; Barnes *v.* Achison 2 *ib.* 454; Henry *v.* Chester, 15 Vt. 460, 1843, nature of authority discussed by *Redfield*, J. Asheville *v.* Means, 7 Ire. Law, 406, 1847; Jonas *v.* Cincinnati, 18 Ohio, 318, 1849; Navigation Company *v.* Portland, 2 Ore. 81; Trustees *v.* Osborne, 9 Ind. 458, 1857; Howell *v.* Buffalo, 15 N. Y. 512; Burnett *v.* Buffalo, 17 N. Y. 383; Maurice *v.* Mayor of New York, 8 N. Y. 120; Fairfield *v.* Ratcliff, 20 Iowa, 396, 1866; Henderson *v.* Baltimore, 8 Md. 352, 1855; Rathbun *v.* Acker, 18 Barb. 393; State *v.* Jersey City, 2 Dutch. (N. J.) 444; 1 *ib.* 309; Columbia *v.* Hunt, 5 Rich. (S. C.) Law, 550; Chicago *v.* Wright, 32 Ill. 192; Taylor *v.* Douner, 31 Cal. 480; Emery *v.* Gas Company, 28 Cal. 345; St. Louis *v.* McLaughlin, Missouri Supreme Court, 1872; Dwarris on Statutes, 749.

"The burden is upon the corporation to show the grant [to lay taxes] by express words, or necessary implication. For otherwise it cannot be justified in the exercise of this high prerogative of sovereignty." *Per Lumpkin*, J., in Savannah *v.* Hartridge, 8 Ga. 23–26, 1850. Statutes authorizing the levying of taxes are strictly construed, and if there is just doubt, that doubt exempts the citizen from the burden: *Ib.* Lot *v.* Ross, 38 Ala. 156, 161, 1861. "The law [authorizing local assessments] must be strictly followed as to all its substantial requirements." *Per Lawrence*, J., Scammon *v.* Chicago, 40 Ill. 146. "Possessing, as these municipal corporations do, the power of assessment and sale of private property, often wielded by the indiscreet and selfish, the grossest abuses would inevitably follow, if they were not held strictly within the powers granted and the means prescribed for the execution of these powers." *Per Stuart*, J., Kyle *v.* Malin (relating to power to tax for local improvement), 8 Ind. 34–37, 1856. "It is undoubtedly true, as held by this court in the City of Richmond *v.* Daniel, 14 Gratt. 387, that laws conferring the power of taxation upon a municipal corporation are to be construed strictly; and so, too, are exemptions from taxation to be construed strictly, and when the power of taxation has been once conferred, it is not to be crippled or destroyed by strained interpretation of subsequent laws." *Per Joynes*, J., Railroad Company *v.* Alexandria, 17 Gratt (Va.), 176, 1867. Tax levied by *de facto* aldermen valid: Dean *v.* Gleason, 16 Wis. 1–17, 1862. *Ante*, Chap. IX. Sec. 214.

[1] *Ante*, Secs. 291–299; Mays *v.* Cincinnati, 1 Ohio St. 268, 1853. If the objects or subjects of taxation are expressly designated, the right to tax for other objects or subjects cannot be derived from the general power, though expressly conferred, to enact by-laws for the good government of the town: Asheville *v.* Means, 7 Ire. Law, 406, 1847.

[2] *Ante*, chapter on Ordinances, Secs. 219–299, 331. And see Mays *v.* Cincinnati, *supra;* Cincinnati *v.* Bryson, 15 Ohio, 625, 1846, approving Boston

thority permitting certain improvements to be made, or liabilities to be created, unless such appears on the whole to have been the clear legislative intent.[1]

§ 607. So, conformably to the *principles adopted for the construction* of this class of powers, it is held that where a statute specifies certain purposes for which taxes may be levied by the municipal authorities, and adds "or for any other purpose they may deem nccessary," these general words will authorize taxation only for purposes of the same general character with those already enumerated.[2] So, power "to levy and collect a special tax" for lighting a city does not authorize the council to add to the tax a per centage for collector's fees nor the cost of proceedings before the mayor; these services must be paid for from the general revenue, unless otherwise specifically provided for by the charter.[3] So, power to make such by-laws as shall be necessary "to promote the peace, good order, benefit, and advantage" of the corporation, and to assess such taxes as shall be necessary for carrying the same into effect, does not authorize a tax for the payment of part of the expense to be incurred by a railroad company, in bringing the line of their road nearer to the town than originally located.[4]

v. Schaffer, 9 Pick. 419. Compare Cincinnati *v.* Buckingham, 10 Ohio, 261, and 1 Ohio St. 268–274, as to correctness of which *quære:* Mayor *v.* Yuile, 3 Ala. (N. S.) 1841; Collins *v.* Louisville, 3 B. Mon. (Ky.) 133; State *v.* Roberts, 11 Gill & Johns. (Md.) 506, *per Archer*, J.; Mayor *v.* Beasley, 1 Humph. (Tenn.) 240. *Infra*, Sec. 609.

[1] Leavenworth *v.* Norton, 1 Kansas, 432, 1863; Burnes *v.* Achison, 2 *ib.* 454. *Ante*, p. 149, Sec. 107, and cases cited. The power to make an improvement does not imply, or carry with it, the power to levy a special assessment upon property benefited to pay for the improvement. Such assessments can only be made where the power to do so is plainly conferred and strictly followed: Wright *v.* Chicago (assessments for deepening river), 20 Ill. 252, 1858; Columbia *v.* Hunt (curbing assessment), 5 Rich. (South Car.) 550; Chicago *v.* Wright, 32 Ill. 192. Power "to regulate and improve sidewalks" does not authorize special assessments upon adjoining owner; but such improvements may be paid for out of the corporation treasury: Fairfield *v.* Ratcliff, 20 Iowa, 396.

[2] Drake *v.* Phillips, 40 Ill. 388, 1866.

[3] Jonas *v.* Cincinnati, 18 Ohio, 318–323, 1849; Nelson *v.* La Porte, 33 Ind. 258. Same principle as to local assessments: Buckwall *v.* Story, 36 Cal. 67; Williams *v.* Detroit, 2 Mich. 560. *Ante*, p. 452, n.

[4] McDermond *v.* Kennedy, Bright. (Pa.) 332, *Ante*, Chap. VI. Secs. 106–108.

§ 608. The *power to levy taxes and make local assessments* conferred upon municipal corporations may, in the absence of constitutional restriction, and when the rights of creditors are not impaired, as we have heretofore shown, *be changed at the pleasure of the legislature*,[1] or resumed and be exercised by commissioners directly appointed by the legislature.[2]

§ 609. The taxing power is to be distinguished from the *police power*, the general nature of which has been before adverted to.[3] The power to license and regulate particular branches of business or matters is usually a police power; but when license fees or exactions are plainly imposed for the sole or main purpose of revenue, they are, in effect, taxes.[4] The authority to license and regulate various matters is very generally conferred upon the municipal councils, and there is, as we have seen in a former chapter, some difference of judicial opinion as to the extent of power thus conferred, particularly in reference to using it for purposes of revenue.[5] Ordinarily, the mere power to license, or to subject to police regulations, does not give the power to tax distinctly for revenue purposes; but it may give the power when such appears from the nature of the subject matter, and upon the whole charter or enactment to have been the legislative intent, but not otherwise.[6]

[1] *Ante*, Chap. IV. p. 75, note; p. 78, Sec. 34; p. 79, Sec. 35; p. 80, Sec. 36; p. 82, Sec. 39; p. 86, Sec. 41; p. 90, Sec. 44. *Ante*, Chap. XIV. Blanding *v.* Burr, 13 Cal. 343; Aspinwall *v.* County of Jo Daviess, 22 How. 364; Gilman *v.* Sheboygan, 2 Black (U. S.), 510; Lansing *v.* County Treasurer, 1 Dillon, C. C. 522; Muscatine *v.* Railroad Company, *ib.* 536; Van Hoffman *v.* Quincy, 4 Wall. 535; Butz *v.* Muscatine, 8 Wall. 575. *Ante*, p. 558, n.

[2] Baltimore *v.* Board of Police, 15 Md. 376, 1859. See on this subject, Chap. IV. *ante:* Philadelphia *v.* Field, 58 Pa. St. 320, 1868. *Ante*, Sec. 43.

[3] *Ante*, Chap. VI. p. 135, Sec. 93. The distinction between the two powers is well stated by *Depue*, J.: State *v.* Hoboken, cited *infra*. *Supra*, Sec. 607.

[4] *Ante*, Chap. XII. Secs. 291–299; Ward *v.* Maryland, 12 Wall. 418, 1870, *per Clifford*, J.

[5] *Ante*, Chap. XII. Secs. 291–299, and cases there cited

[6] *Ib.* See, also, *ante*, p. 125, Sec. 79; Freeholders *v.* Barber, 2 Halst. (N. J.) 64. Power to license inns gives no power to tax: *Ib.* Same principle: Kip *v.* Patterson, 2 Dutch. (N. J.) 298; New York *v.* Avenue Railroad Company, 32 N. Y. 261. *Ante*, Chap. XII. p. 302. Thus, agreeably to the rule stated in the text, it was held in the State *v.* Hoboken, 33 N. J. Law,

§ 610. As the authority to levy taxes or to make local assessments does not, as we have just seen, exist unless unequivocally conferred, so it can be exercised no *further than it is clearly given;* and if the *mode* in which the authority shall be exercised is prescribed, *that mode must be pursued.*[1] There is, however, some difficulty at times to distinguish provisions which are imperative from those which are directory merely.[2]

280, 1869, that the power given to a municipal corporation to *regulate* streets and the building of vaults will not authorize an exaction or assessment which amounts to a tax upon the owners of lots for permission to builp vaults in the streets in front of their property, or to improve the streets for their more convenient use.

Power to license *vending of intoxicating liquors* within a short distance of the municipality valid as a police regulation: Falmouth *v.* Watson, 5 Bush, (Ky.) 660, 1869; Mason *v.* Lancaster, 4 *ib.* 406, where, by its charter, a city is authorized to assess a tax on licenses to do certain kinds of business, it may require the *payment* of the tax as *a condition precedent* to issuing the license: Sights *v.* Yarnalls, 12 Gratt. (Va.) 292, 1855.

[1] *Ante*, pp. 101–104, Sec. 55, and note; D'Antignac *v.* Augusta, 31 Ga. 700; Lott *v.* Ross, 38 Ala. 156, 1861; Fitch *v.* Pinckard, 4 Scam. (Ill.) 78; Henderson *v.* Baltimore, 8 Md. 352, 1855; Rathbun *v.* Acker, 18 Barb. 393; Chicago *v.* Wright, 32 Ill. 192; Crane *v.* Janesville, 20 Wis. 305; Knox *v.* Peterson, 21 Wis. 247; Collins *v.* Louisville, 2 B. Mon. 134; Cross *v.* Morristown (mode), 18 N. J. Eq. 305, 1867; Bouldin *v.* Baltimore, 15 Md. 18, 1859; Dwarris on Statutes, 749.

All the steps required by law to *confer jurisdiction* to order improvement must be complied with: Himmelman *v.* Danos, 35 Cal. 441; Dougherty *v.* Hitchcock, *ib.* 512; Nicholson Paving Company *v.* Painter, *ib.* 699; Himmelman *v.* Oliver, 34 *ib.* 246; Lexington *v.* Headley, 5 Bush (Ky.), 508; Welker *v.* Potter, 18 Ohio St. 85. Where *mode* of making improvements is prescribed by statute, "*the mode in such cases constitutes the measure of power:*" *Field*, C. J., in Zottman's Case, 20 Cal. 102; approved by *Sanderson*, J., in Nicholson Paving Company *v.* Painter, 35 Cal. 699. Where the organic law of a city is silent as to the manner in which it shall express its determination to improve a street, this may be done by motion or resolution as well as by ordinance: Indianapolis *v.* Imberry, 17 Ind. 175, 1865. *Ante*, p. 271.

[2] A statute requiring a tax to be levied on a day named held directory, and the duty may be performed within a reasonable time thereafter: Gearhart *v.* Dixon, 1 Pa. St. 224, 1845. But in Williamsport *v.* Kent, 14 Ind. 306, 1860, an incorporating statute provided that "the board of trustees shall, *before* the third Tuesday in May, each year, determine the amount of general tax for the current year," and although it was not expressly declared by the statute that they should not exercise the power after the time named, it was nevertheless decided that a tax levied after the third Tuesday in May was void. *Sed quære. Post*, Chap. XX.

It is not unusual, in the organic acts of municipalities, for the protection of the citizens, to *limit the rate of taxation*, or the amount of taxes that may be raised during any one year; and where the power is thus limited, it is not ordinarily enlarged by implication, by other provisions of the charter, general in their nature, conferring the power to make contracts, or to incur liabilities, or even giving authority to make improvements, or to erect usual or ordinary buildings.[1] But *special authority* to borrow money for a designated purpose may, and if such be the legislative intention will, impliedly repeal, *pro tanto*, existing charter limitations upon the rate of taxation.[2] Where the charter limit as to the amount of taxes or rate of taxation for any given year is not exceeded, there may be *different levies of taxes* in the same year, which, where the charter is silent on the point, may be either a fiscal year or calendar year, in the discretion of the council.[3]

§ 611. The *general statutes of every state* contain elaborate *revenue laws*, declaring what property is taxable and in what manner it shall be taxed; but municipalities, as we have seen, must have a specific and clear grant of power to authorize *them* to levy and collect taxes, and the manner in which it is conferred often leaves it to be determined by judicial construction *how far the provisions of the general law apply to municipal corpora-*

[1] Benoist *v.* St. Louis, 19 Mo. 179, 1853; Clark *v.* Davenport, 14 Iowa, 494; Larned *v.* Burlington, 2 Am. Law Reg. (N. S.) 394, and note; Leavenworth *v.* Norton, 1 Kansas, 432; Burnes *v.* Achison, 2 Kansas, 454. But see Commonwealth *v.* Pittsburg, 34 Pa. St. 496; Amey *v.* Allegheny City, 2 How. (U. S.) 364; Eosdick *v.* Perrysburg, 14 Ohio St. 472; Butz *v.* Muscatine, 8 Wall. 575, 1869. *Ante*, p. 149, Sec. 107.

[2] *Ante*, p. 149, Sec. 107, and cases there cited. In the Commonwealth *v.* Pittsburg, above cited, a city, by a special act of the legislature, was authorized to create a large debt for a particular purpose, and to borrow money therefor, and to make provision for the payment thereof by the assessment and collection of such tax as might be necessary therefor; this was held, as respects the particular debt thus created, to be a repeal of any pre-existing restrictions upon the power of taxation.

[3] Benoist *v.* St. Louis, 19 Mo. 179, 1853. But, in the aggregate, the charter limit must not be exceeded: *Ib.* Where there is no restriction in the charter as to the time or amount of levy, the city council, on ascertaining that the first levy will prove insufficient, may levy an additional tax during the same year: Municipality *v.* Cotton Press Company, 6 Rob. (La.) 411.

tions. The ordinary principles of construction, where there is a conflict between the general and special legislation, have been referred to in a previous chapter.[1] In some instances, municipal charters have been held to authorize the corporations to tax in a different mode, or upon different principles, from that adopted by the legislature in respect to state taxation.[2]

§ 612. In Virginia, the general laws imposing taxes for the support of the state government required railroad companies to pay into the state treasury, for every passenger transported, one mill for every mile of transportation, and then provided that "every company paying such shall not be assessed with *any tax* on its lands, buildings, or equipments." The charter of a city in that state gave it power to "raise money by taxes for the use of the city, provided the laws for that purpose be not repugnant to the laws of the state." It was held that the general tax law was intended to refer only to *state* taxation, and did not extend to municipalities; that the proviso in the city charter does not limit the power of the city to tax only such property or subjects as are taxed by the state; and that, under the above-mentioned power in its charter, the city could tax the real estate and personal property of the company permanently located therein, and the opinion was expressed that, as the residence or domicil of the company was in that city, it could also tax the rolling stock employed on the road of the company.[3]

§ 613. But authority conferred by the charter of a village corporation to assess taxes "upon the freeholders and inhabitants of said village *according to law*," means according to the

[1] *Ante*, Chap. V. p. 100, Sec. 54, and cases cited; State *v.* Branin, 3 Zabr. (N. J.) 484, 1852.

[2] Adams *v.* Mayor, 2 Head (Tenn.), 363; Mayor *v.* Bailey, 1 Humph. (Tenn.) 232, 240; Shoalwater *v.* Armstrong, 9 *ib.* 217; Gless *v.* White, 5 Sneed (Tenn.), 475. *Instances of general law not applying to cities:* Langdon *v.* Fire Department, 17 Wend. 234; Furman *v.* Knapp, 19 Johns. 248; Municipality *v.* Railroad Company, 10 Rob. (La.) 187; Municipality *v.* Bank, 5 *ib.* 151. See Sanders *v.* McLin, 1 Ire. (Law) 572.

[3] Railroad Company *v.* Alexandria, 17 Gratt. (Va.) 176. *Ante*, Sec. 54.

provisions and principles of the general tax law in force at the time the assessment is made.[1] So authority in the charter of a city to "assess all *taxable* real and personal property within the city," refers to the general state law to ascertain what kind of property is subject to taxation, and the corporation has power to assess not only what was then taxable, but also whatever might afterwards be made subject to taxation by any general statute.[2]

[1] Ontario Bank *v.* Bunnell, 10 Wend. 186, 1833; approved, Buffalo *v.* Le Couteulx, 15 N. Y. 451, 455, 1857; American, &c. Company *v.* Buffalo, 20 N. Y. 381, 391, *per Denio*, J.; State Bank *v.* Madison, 3 Ind. 43, 1851; Gardner *v.* State, 1 Zabr. (N. J.) 557. *Ante*, Sec. 54.

"There are numerous bodies in this state, like the village in question, which possess to a limited extent the power of local taxation, and, I presume, in every instance the principles and mode of imposing a tax are ascertained by reference to the *general law;* and we should lament to be obliged to give to their several powers such a construction as would prevent a participation in the improvements of the system of taxation which are made from time to time, and to be found only in the general law on the subject:" *Per Nelson*, J., in the Ontario Bank *v.* Bunnell, 10 Wend. 186, 1833. *Ante*, Sec. 54.

How far the *general laws of the state* in regard to taxation *apply to villages, towns, and cities*, see Mayor, &c. of Troy *v.* Mutual Bank, 20 N. Y. 387; American, *&c.* Company *v.* Buffalo, *ib.* 388, note. In this last case, p. 391, *Denio*, C. J., lays down this proposition: "Where the general law is made applicable [to municipalities] in this way [that is, by words of reference to the general laws contained in their charters], any change in the general law would produce a corresponding change in the method of taxation by municipal corporations, the reference being to the law as it shall exist for the time being." Same principle: Ontario Bank *v.* Bunnell, 10 Wend. 186, 1833; Buffalo *v.* Le Couteulx, 15 N. Y. 451; Davenport *v.* Railroad Company, 16 Iowa, 348. The view of *Wright* and *Dillon*, JJ., in the case last cited, was subsequently adopted by the Supreme Court in a case not yet reported (1871); State *v.* Town Council, 8 Rich. (South Car.) 214. Where a city is authorized "to levy a tax upon the tax-payers of the city, taxable under the revenue laws of the state," such tax must be levied upon the same persons and property as prescribed by the revenue laws of the state. The phrase "tax-payers of the city, taxable under the revenue laws of the state," designates both the person and subject of taxation: Banett *v.* Henderson, 4 Bush (Ky.), 255.

[2] Buffalo *v.* Le Couteulx, 15 N. Y. 451, 1857; 10 Wend. 186, *supra;* Davenport *v.* Railroad Company, *supra;* Lot *v.* Ross, 38 Ala. 156, construing the words "*taxable property.*" But, in South Carolina, in cases arising under the charter of the city of Charleston, which is authorized "to assess those who hold *taxable property* within the same," the words "taxable property" were construed "to mean *all property not exempt by law from taxation*," whether

§ 614. The *general statutes of the state* upon the subject of taxing property undoubtedly *refer to private property*, and not to that owned by the state; and, in view of the public nature of municipalities, and the purposes for which they are established, heretofore explained,[1] the author is of opinion that such enactments do not, by *implication*, extend to any property owned by them — certainly to none owned by them for public uses.[2] On this ground it was held that a sale of lands, the property of a city corporation, and constituting part of the *city cemetery*, for taxes, was void.[3]

§ 615. The view just expressed has not, however, received, in its full extent, the sanction of the Court of Appeals in Kentucky. Under the statute laws of that state, there was *no express exemption of municipal property from taxation*, and the state, for state revenue, assessed against the city of Louisville a large amount of property, including the city hall, market houses, fire engines, wharves, &c., and the case presented the question whether the property was or was not exempt, by implication, from taxation by the state. And the judgment of the court was, that whatever property was used and held by the city for carrying on its municipal government, or was necessary or useful for that purpose, was not taxable by the state, and this would include public buildings, prisons, and property dedicated to charity; but that whatever is not so used, but is owned by the city in its "social or commercial capacity," and for its own *profit*, such as vacant lots, market houses, fire engines, and the like, is subject to taxation.[4]

the state taxes the particular kind of property or not for state purposes. The words are not equivalent to the phrase, "property taxed by the state;" but *quære:* State *v.* City Council, 10 Rich. (South Car.) Law, 240, 1857; City Council *v.* St. Phillip's Church, 1 McMul. (South Car.) Eq. 139; State *v.* City Council, 4 Strobh. (Law) 217; State *v.* City Council, 1 Mill. Ch. 40; State *v.* City Council, 5 Rich. (Law) 561; City Council *v.* Condy, 4 *ib.* 254; City Council *v.* State, 2 Speers (South Car.), Law, 719; *ib.* 623.

[1] *Ante*, Chap. I. p. 17, *et seq.;* Chap. II. p. 28, *et seq.;* Chap. IV. p. 72, *et seq.*

[2] *Ante*, Chap. XV., as to Corporate Property, Secs, 445, 446.

[3] People *v.* Doe, 36 Cal. 220, 1868. *Ante*, p. 560, n.

[4] Louisville *v* Commonwealth, 1 Duvall (Ky.), 295, 1864. The author, with deference to the learned court, ventures to observe that, in his judgment, the exemption should have been extended to all the property.

§ 616. As the burden of taxation ought to fall equally upon all, statutes *exempting persons or property are construed with strictness*, and the exemption should be denied unless so clearly granted as to be free from any fair doubt.[1] Thus, although an "assessment" is in the nature of a tax and is authorized by, or is a branch of, the taxing power, yet a general statute exempting certain property — as, for example, churches — from "*taxation* by any law of the state," does not exempt it from liability

Municipal corporations are not usually allowed to hold or deal in property directly for profit; and this is not the purpose for which authority is given to erect market houses or wharves, or to purchase and own fire engines. Of course the state might provide for the taxation of property owned by its municipalities, but its revenue laws should not be construed to extend to such property unless the legislative intention to that effect be manifest: See People *v.* McCreery, 34 Cal. 43; Mayor *v.* Bank of Tennessee, 1 Swan (Tenn.), 269.

[1] Orr *v.* Baker ("church property"), 4 Ind. 86, 1853; Gordon *v.* Baltimore, 5 Gill (Md.), 231, 1847, and cases cited; State *v.* Town Council ("agricultural property"), 12 Rich. (South Car.) Law, 339; Municipality *v.* Railroad Company (inter-corporate real estate), 10 Rob. (La.) 187; Municipality *v.* Bank, 5 *ib.* 151; Trustees *v.* McConnell (constitutional limitation), 12 Ill. 138; Railroad Company *v.* Alexandria, 17 Gratt. (Va.) 176, 1867, *per Joynes*, J.; People *v.* McCreery, 34 Cal. 43.

The *illegal exemption* of another from a tax or assessment is no ground for an injunction against the corporation unless the plaintiff is injured thereby, as by being compelled to pay more than his proportion: Page *v.* St. Louis, 20 Mo. 136, 1854. The *ommission of an assessor to assess* certain parcels of property subject to taxation, whether arising from a misapprehension of the law, as by giving effect to void provisions of a statute, or a mistake of fact, will not invalidate his general assessment list: People *v.* McCreery, 34 Cal. 43. An omission by the assessors to assess a given individual because he is poor, and his property was of little value, does not invalidate the whole assessment: Williams *v.* School District, 21 Pick. 75, 1838; Weeks *v.* Milwaukee, 10 Wis. 242; Kneeland *v.* Milwaukee, 15 *ib.* 454; Bond *v.* Kenosha, 17 *ib.* 284; Dean *v.* Gleason, 16 *ib.* 1, 15; Hersey *v.* Supervisors, 16 *ib.* 185.

The Wisconsin cases assert the following rule as to the effect of the omission to tax property liable to taxation: "Omissions of this character, arising from mistakes of fact, erroneous computations, or errors of judgment on the part of those to whom the execution of the taxing laws is entrusted, do not necessarily vitiate the whole tax. But intentional disregard of those laws, in such manner as to impose illegal taxation on those who are assessed, does:" *Per Paine*, J., in Weeks *v.* Milwaukee, *supra*. The language was used in a case in which the city council, in view of the benefit which the construction of a new hotel would be to the city, intentionally omitted to cause the

for a street assessment.[1] So, in Maryland, the exemption of property of a cemetery company from "any tax or public imposition whatever," does not exempt it from a paving tax for improving a street in front of the property, the court (in an opinion elaborately examining the subject), holding that the intent of the legislature was to exempt the property from all taxes or impositions for the *purpose of revenue*, but not to exonerate it from charges inseparably incident to its location with respect to other property.[2] And the same view has been elsewhere sanctioned.[3]

lots upon which it was being erected to be taxed. But *quære* as to this effect of even an *intentional* omission by the city council. If the illegal exemption does not increase the amount which others are taxed, they are not injured. If it does, should they not compel, by *mandamus*, the city authorities to assess all the property liable to taxation? At all events, it is a very serious doctrine to hold that the omission, even though directed by the council, should have the effect to vitiate and overthrow the *whole tax* list for the year.

[1] In the matter of the Mayor, &c. 11 Johns. 77. This is the leading case on the subject, and the point *decided* has been generally approved, although some of the reasons have been criticised: People *v.* Mayor, &c. of Brooklyn, 4 N. Y. (4 Comst.) 419, 432, and cases reviewed; Bleecker *v.* Ballou, 3 Wend. 263; Sharp *v.* Spier, 4 Hill (N. Y.), 76, 82; *ib.* 92; Presbyterian Church *v.* City of New York, 5 Cow. 538; Mayor, &c. of New York *v.* Cashman, 10 Johns. 96.

[2] Baltimore *v.* Cemetery Company, 7 Md. 517, 1855. In thus holding, the court does not proceed upon the ground that it was an *assessment*, and not a *tax*, which was sought to be collected from the cemetery company; it admitted it was a *tax*, but held it was not such a tax as was meant by the exempting statute, which is the sound view of the subject. The Chief Justice observes: "The distinction, if any, between a '*tax*' and an '*assessment*' is not very palpable. The meaning of the words is the same in our laws:" *Per Le Grand*, C. J., *ib.* 535. See, also, Dolan *v.* Baltimore, 4 Gill (Md.) 394.

[3] Pray *v.* Northern Liberties, 31 Pa. St. 69, 1850; Northern Liberties *v.* St. John's Church, 13 Pa. St. 104, 1850; following 11 Johns. 77, *supra*. S. P. Lockwood *v.* St. Louis, 24 Mo. 20, 1856; Garrett *v.* St. Louis, 25 Mo. 505; Egyptian Levee Company *v.* Hardin, 27 Mo. 495. In the case of the St. Louis Public Schools *v.* St. Louis, 26 Mo. 468, following Lockwood *v.* St. Louis (local assessment on church property), 24 Mo. 20, it was held that the real estate of the board of *public* schools of a city (a distinct corporation) was liable to a local assessment for sewers, sidewalks, opening streets, &c.; but *quære:* Emery *v.* Gas Company, 28 Cal. 345, 1865; Taylor *v.* Palmer, 31 Cal. 240, 1866; Brightman *v.* Kirner, 22 Wis. 54. Exemption of an institution "from all *taxation* by state, parish, or city," is not an exemption from sidewalk or street *assessments:* Lafayette *v.* Male Orphan Asylum, 4 La. An. 1, 1849.

§ 617. But aside from the rule of strict construction which applies to exemptions from taxation, the cases cited in the previous section will show that there is, in their ordinary use, a recognized *difference between the words "tax" and "assessment,"* and that the one does not always, or usually, include the other. Thus, a constitutional provision that "Taxation shall be equal and uniform throughout the state," does not apply to local assessments upon private property to pay for local improvements.[1] So a provision of the constitution of a state which requires "the rule of taxation to be uniform," in connection with another provision, that "It shall be the duty of the legislature to provide for the organization of cities, and to restrict their power of taxation, *assessment*, &c., so as to prevent abuses in *assessments* and taxation," is construed not to apply to special *assessments* by municipal corporations, made by authority of the legislature, for local improvements.[2]

So a railroad charter exempting the company (in consideration of the payment of a certain tax) from "any other or further *tax or imposition* upon it," does not exempt it from liability for an assessment upon houses and lots owned by it and benefited by the opening and widening of a street; but the corporation cannot, for such a purpose, be assessed without reference to the special benefit conferred upon property owned by it, since such an assessment would be, in fact, a *tax* from which it is exempt: State *v.* Newark, 3 Dutch. (N. J.) 185, 1858. So an exemption from "*taxes, charges, and impositions,*" does not exonerate a private corporation from assessments on its property for opening or paving streets on which it fronts: Patterson *v.* Society, &c. 4 Zabr. (N. J.) 385, 1854, following Matter of Mayor, &c. 11 Johns. 77. Further illustrations, see, also: Paine *v.* Spratley, 5 Kansas, 525; Chicago *v.* Colby, 20 Ill. 614; Trustees *v.* Chicago, 12 Ill. 403; Ottawa *v.* Trustees, 20 Ill. 423. See, as to difference between "tax" and "assessment," and for views not coincident with those generally entertained: Chicago *v.* Larned, 34 Ill. 203, 1864; Ottawa *v.* Spencer, 40 Ill. 211; Railroad Company *v.* Spearman 12 Iowa, 112. *Ante*, Secs. 592, 603.

[1] Draining Company Case, 11 La. An. 338, 1856, where the subject is very fully examined. S. P. Surgi *v.* Snetchman (paving assessment), *ib.* 387; Yeatman *v.* Crandall (levee tax), *ib.* 220. *Supra*, Secs. 594, 600.

[2] Weeks *v.* Milwaukee (street assessment), 10 Wis. 242, 1860; Lumsden *v.* Cross (street assessment), *ib.* 282; State *v.* Portage (street assessment), 12 *ib.* 562; Bond *v.* Kenosha (harbor tax or assessment), 17 *ib.* 284. The Supreme Court of Wisconsin profess to follow the construction given by the Supreme Court of Ohio to similar provisions in the constitution of that state: Hill *v.* Higdon, 4 Ohio St. 243; Reeves *v.* Wood County, 8 *ib.* 333. See observations of Judge *Cooley:* Const. Lim. 510, note. But the principle of uniformity is considered by the court to apply to ordinary municipal taxes:

§ 618. We have already had occasion to refer to the principle that *public powers* conferred upon a municipality to be exercised by its council when, and in such manner, as it shall judge best, are *incapable of delegation*.[1] The principle extends to the authority conferred upon a municipal corporation to levy and collect taxes or to determine upon the necessity and the character of local improvements.[2]

Weeks *v.* Milwaukee, *supra, per Paine*, J.; Dean *v.* Gleason, 16 Wis. 1–16. In Bond *v.* Kenosha, 17 Wis. 284, 1863, the Supreme Court of Wisconsin decided that the provision of the charter of the city of Kenosha, authorizing the council, for the purpose of constructing a harbor in the city, to levy a special tax on all lands within the city subject to taxation, *not including any improvements made thereon*, was in the nature of a special assessment for local improvements, and did not contravene any provision of the constitution of the state. *Supra*, Secs. 598–600. *Infra*, Sec. 622.

[1] *Ante*, p. 108, Sec. 60, and cases cited.

[2] *Ib.* McInerney *v.* Reed, 23 Iowa, 410, 1867; Meuser *v.* Risdon, 36 Cal. 239. In Swartz *v.* Flatboats, 14 La. An. 243, 1859, it was held (but *quære*, as to its correctness) that the power to "alien, *lease, farm*, and dispose of all and every kind of property," and to lay and collect taxes in *such a manner* as may be deemed expedient, on all steamboats, &c. landing at the levee of the corporation," gave the corporation power to lease, for a period of years, to a private person, the revenues of the port, with the privilege of collecting them in his own name, and for his own benefit.

The principle stated in the text is thus enforced by the Court of Appeals in Kentucky, in a case arising in the city of Louisville. In substance, the court say, the general council of the city of Louisville, by ordinance as prescribed in the city charter, may direct or authorize the sidewalks in the city to be graded, paved, curbed, &c. at the cost of the owners of the property fronting thereon. The council alone can determine the necessity of such improvement, as well as its kind and character, and has no authority to refer the determination of these matters to any other body or person. The power to pass ordinances to improve streets is legislative, and cannot be delegated. It is in effect a power of taxation, which is the exercise of sovereign authority. To ordain generally that a street or square shall be graded and paved, or "*so much thereof as the engineer may direct, and according to specifications to be furnished by him*," is simply to delegate to him the power to fix the grade, determine what materials should be used for the pavement, and how much of the street or square should be thus improved, and is not the determination of the council as to any of these things. To allow such an ordinance to bind the property holder is, in the opinion of a majority of the court, to destroy all the safeguards thrown around him by law. Subsequent acts of affirmance by the city council cannot validate an invalid ordinance: Hydes *v.* Joyes, 4 Bush (Ky.), 464. *Robertson*, J., non-concurred. But where the act of the legislature charged the burden of certain local improvements upon the adjoining lots, and directed the street com-

§ 619. Not only the power to tax, but the power to make local improvements at the expense of the property benefited, is like all other legislative power of the municipality,— a *continuing one*,—unless there be something to indicate the contrary, and hence it is not exhausted by being once exercised.[1] Therefore, the power to compel property owners to pave, ordinarily extends to compelling them to *re-pave*, when required by the municipal authorities.[2]

missioner to make out the assessment, it is not necessary that the city assess the tax by an ordinance, and an ordinance to that effect, if passed, is not a delegation by the corporation of its power of taxation: Schenley *v.* Commonwealth, 36 Pa. St. 62, 1859. In South Carolina, under a general power to the *city council* to make local assessments and to appoint officers to execute the corporate powers and duties, it is held not to be a valid objection to an assessment that it was made, pursuant to ordinances or regulations, by the officers of the corporation and not by the corporation itself; for the city council is to be regarded as a local legislative body for the purpose of making by-laws, with power to cause them to be carried out; and particularly is such an objection without force when the assessments have first to be submitted to and approved by the council: Cruikshanks *v.* City Council, 1 McCord (South Car.), 360, 1821; *ib.* 345. Compare City Council *v.* Pinckney, 1 Const. 42, 1812; S. C., 3 Brev. 217. Where such a course is expressly authorized by the charter, a grade for a street need not be previously fixed by the council, but it may require the adjoining owners to make certain improvements according to the direction of the city paver, who may thus determine the grade: State *v.* New Brunswick, 1 Vroom (N. J.), 395, 1860. See, further, *ante*, p. 108, Sec. 60.

[1] *Ante*, Chap. XVIII. p. 524, Sec. 543.

[2] Williams *v.* Detroit, 2 Mich. 560, 1861. Power to "repair or pave streets," authorizes a corporation to remove an old pavement and replace it with a new one of a different description: Gurner *v.* Chicago (Nicholson pavement), 40 Ill. 165, 1866. In Municipality *v.* Dunn, 10 La. An. 57, 1855, the city sued to recover a portion of the cost of repaving a street in front the defendant's lot. It appeared that the street had been previously paved with round stone, at the expense of the property. This, it was found, would not resist the heavy hauling, and was replaced by the one built of square block stone, for which suit was brought. The defence was that although the right to assess the property for the first pavement was given, yet the corporation had no right to compel a contribution from the same property for the second pavement. The majority of the court held that the power to pave the streets was a continuing power, to be exercised when the public good requires it, and extended as well to the making of a new in the place of an insufficient pavement as to the one first built—the equity in both cases being regarded as the same. As to repaving, compare Hammett *v.* Philadelphia, 65 Pa. St. 146, cited *supra*, and see Lafayette *v.* Fowler, 34 Ind. 140.

§ 620. It is plain that the *powers of taxation* conferred upon the municipal authorities by the charter or organic act, and the mode of exercising such powers when prescribed therein, *cannot be varied by ordinances or by-laws.*[1] Therefore, a city corporation cannot impose terms or conditions which can affect the validity of a tax sale made within the authority conferred by the legislature.[2] So, under a charter constituting the city marshal the collector of taxes, and making it his duty to receive and collect the taxes due the corporation, it is not competent for the council by ordinance to dispense with the duties which the charter imposes upon this officer and devolve them upon another.[3] So, under a charter authorizing a town corporation "to collect taxes upon all real estate within the town, not exceeding one-half per cent upon the assessed value thereof," it cannot pass an ordinance directing lots to be taxed without considering the value of the improvements upon them, for since buildings are part of the land which the legislature had designated as the property to be taxed, such an ordinance makes a discrimination which the charter does not authorize.[4]

§ 621. The authority of municipal corporations to levy and collect taxes is usually limited not only as respects the rate of taxation, but the objects of it.[5] Under grants of this character, the question has arisen not only as to what property the municipality *may*, but also as to what it *must*, subject to taxation for the purpose of obtaining revenue, or discharging liabilities. Thus, the city of New Orleans was authorized by charter "to raise money by taxation, in such manner as to the

[1] *Ante*, chapter on Ordinances, p. 277, Sec. 251; Weeks *v.* Milwaukee, 10 Wis. 242, which holds that the city cannot exempt from taxation property which the laws make taxable.

[2] Thompson *v.* Carroll, 22 How. (U. S.) 422, 1859.

[3] Placerville *v.* Wilcox, 35 Cal. 21, 1868.

[4] Fitch *v.* Pinckard, 4 Scam. (Ill.) 78; approved, Primm *v.* Belleville, Illinois Supreme Court, April, 1872, 4 Chicago Legal News, 227.

[5] Power to levy taxes confined to kinds of property mentioned in the charter: Rabassa *v.* Mayor, &c. 1 Martin (La.), N. S. 484; 3 *ib.* (O. S.) 218; Blanc *v.* Mayor, 1 Martin (N. S.), 65; *ib.* (O. S.) 120; Harper *v.* Elberton, 23 Geo. 566; Municipality *v.* Johnson, 6 La. An. 20, 1851; Barrett *v.* Henderson, 4 Bush (Ky.), 255; Dubuque *v.* Insurance Company (premiums received by local agent of foreign insurance company), 29 Iowa, 9.

council shall seem proper, upon *real and personal estate*," &c. It was claimed that the city was bound to tax both species of property at the same time, and that a tax could not legally be imposed upon either alone. This view, however, was not sustained by the court, which said: "It does not appear to us that the power given to tax real and personal estate, renders it imperative on the corporation to tax both. By the same section of the law, the city council are empowered to exercise their authority as to them may seem proper."[1]

§ 622. But there may be a *constitutional limitation* both upon the legislative and municipal power to select one class of property for taxation and omit another. In an important case relating to this subject, there was a constitutional provision "that the rule of taxation shall be uniform," &c., which was considered to mean that all kinds of property not absolutely exempt must be taxed alike, by the same standard of valuation equally with other taxable property, and co-extensively with the territory to which it applies; and therefore a tax to pay a city debt ordered to be levied exclusively upon the *real* property within the city, is a discrimination in favor of personal property, and violates the uniformity required by the constitution, and is void.[2]

§ 623. Power to tax real and personal estate within the city corporation does not confer the right to tax *capital employed in merchandise*, distinct from the articles of property in which such capital is invested.[3]

[1] Oakley *v.* Mayor, &c. 1 La. 1, 1830; S. P. Municipality *v.* Duncan, 1 La. An. 182, 1847. The power of a city corporation to levy a general tax upon one species of property—for example, real estate—and to omit personal property, was, under the construction of special charter provisions, sustained in the case of Frederick *v.* Augusta, 5 Geo. 561, 1848; Primm *v.* Belleville, Illinois Supreme Court, 1872, reported in 4 Chicago Legal News, 227.

[2] Gilman *v.* Sheboygan, 2 Black (U. S.), 510, 1862, approving on the constitutional point; Knowlton *v.* Supervisors, 9 Wis. 410; Weeks *v.* Milwaukee, 10 *ib.* 242; Sanderson *v.* Cross, *ib.* 282; Attorney General *v.* Plank Road Company, 11 *ib.* 42; Zanesville *v.* Richards, 5 Ohio St. 589; Exchange Bank *v.* Hines, 3 *ib.* 1. See Muscatine *v.* Railroad Company, 1 Dillon, C. C. 536. *Ante*, p. 88, Sec. 42. *Supra*, Sec. 593, *et seq.* 617, 620.

[3] Municipality *v.* Johnson, 6 La. An. 20, 1851.

§ 624. Authority in the charter of a municipal corporation to tax "all real and personal estate within the corporate limits of the city," was held, in view of the language and history of legislation in the state as to the subject matter of taxation, not to confer upon the corporation power to tax *income* or *particular occupations*.[1]

§ 625. One of the most usual of the express limitations upon the power of municipal taxation is the one confining it to property *within the corporation*. What property is to be considered *within* the municipality, so as to give the right to tax it, is, in some instances, hard to determine.[2] With respect to the *situs* of real estate, there can, ordinarily, be no doubt. But as respects *personal property*, its *situs* is often difficult to settle. If the property is tangible and actually situate within the municipality, it is plain that it may be taxed by it, under the authority we are considering, irrespective of the residence or domicil of its owner.[3]

§ 626. In Indiana, where a city had authority by charter to tax all property "*within its limits*," it was holden that the share of the *part owner of a steamboat*, or the boat itself, though in the course of her voyages it necessarily touched at the city, was not subject to taxation by the city, though the owner or part

[1] Savannah *v.* Hartridge, 8 Geo. 23, 1850; distinguished from cases in South Carolina, which hold that the city of Charleston, under the power to levy taxes on "*taxable property*," may tax income: Linning *v.* Charleston, 1 McCord, 345; 1 Nott & McCord, 527.

[2] St. Louis *v.* The Ferry Company, 11 Wall. 423, 1870. It is obvious, says Mr. Justice *Swayne*, in this case, that the purpose of the legislature in conferring authority of this nature was not to tax property through the proprietor, but to tax things themselves, by reason of their being "within the city:" *Ib.* 431; Trigg *v.* Glasgow, 2 Bush (Ky.), 594.

[3] St. Louis *v.* The Ferry Company, 11 Wall. 423, 430, *per Swayne*, J.; Finley *v.* Philadelphia, 32 Pa. St. 381; Mills *v.* Thornton, 26 Ill. 300; Railroad Company *v.* Morgan County, 14 Ill. 163; St. Louis *v.* Wiggins Ferry Company, 40 Mo. 580, 1867; Hoyt *v.* Commissioners of Taxes, 23 N. Y. 228; New Albany *v.* Meekin, 3 Ind. 481, cited *infra;* People *v.* Niles, 35 Cal. 282. As to taxation of personal property where the owner is a corporation or has his domicil in one town and does business in another, see Gardiner, &c. Company *v.* Gardiner, 5 Greenl. (Maine) 133, and cases there cited.

owner be domiciled or resident therein.[1] So, in Illinois, under power to tax property "within the limits of the city," a *steamboat* belonging to a resident of the city, but registered elsewhere, and only touching at the city during her trips up and down the river, cannot be taxed.[2]

§ 627. So a municipality, under the power to tax property "within the city," has been held not to be authorized to tax the *ferry boats* of a *foreign* private corporation, whose chief relation to the city was regarded as being "merely that of contact there as one of the termini of their transit across the river in the prosecution of their business."[3] Under the facts, as re-

[1] New Albany *v.* Meekin, 3 Ind. 481, 1852. As to place of taxation: Evansville *v.* Hall (domicil; insurance stock), 14 Ind. 27; Reiman *v.* Shepard (domicil; *situs* of personal property), 27 Ind. 288; Madison *v.* Whitney (bank stock), 21 Ind. 261; Powell *v.* Madison (pork owned by non-residents but slaughtered and stored in city), 21 Ind. 335; 18 *ib.* 33. *Perkins*, J., in delivering the opinion of the court in the case first cited, says: "We do not think that, for the purposes of taxation, a court is authorized to apply the rule of law governing the personal estate of deceased persons which regards its *situs* as following the domicil of the owner. Surely, no one would risk asserting the general proposition that, under the charter of New Albany, all the personal property owned by every resident of the city, no matter where situated, was liable to be taxed by said city; that if a citizen of New Albany was a partner in a steamboat plying on some river in California, or in a flock of sheep kept in Kentucky, in some part of Floyd county, in this state, out of the corporation of New Albany, he was liable to be taxed for it under its charter. We do not deny that the state might have authorized it to tax such property, but we think she has not:" 3 Ind. (Port.) 483.

[2] Wilkey *v.* Pekin, 19 Ill. 160, 1857. But, in Alabama, a municipal corporation with power to lay taxes "on real and personal estate within the city" was held authorized to levy a tax on a steamboat owned by a resident of the city and navigating the waters of a stream on which the city was situate. And the authority to tax was declared to extend even to cases where the owner of the boat was a non-resident of the state, if he resided in the city during the business season. And the power to tax in such cases was held to exist although the boats were registered and enrolled as coasting vessels under the laws of the United States: Battle *v.* Mobile, 9 Ala. 234, 1846.

See, further, as to taxation of *boats and vessels:* Oakland *v.* Whipple, 39 Cal. 112; Hays *v.* Pacific Steamship Company, 17 How. (U. S.) 598; Hoyt *v.* Commissioners of Taxes, 23 N. Y. 224; St. Joseph *v.* Railroad Company, 39 Mo. 476.

[3] St. Louis *v.* The Ferry Company, 11 Wall. 423, 1870.

ported, the question is certainly a close one, and had previously been decided the other way by the Supreme Court of Missouri.[1]

§ 628. The property of a *street railway company*, including its road bed, situate within the limits of a municipal corporation, is ordinarily subject to its taxing power; and if no different provision be made, it has been held that a street railroad may be taxed as real estate.[2] An exclusive municipal grant to such a railway company to use the streets in the municipality, does not exempt it from municipal control nor deprive the municipal authorities of the right, otherwise existing, to require the company to pay a license or tax.[3] Nor does the payment of a tax or license of a specified sum or amount on each car employed by a city railway company to the city, as required by the contract between the company and the city, in which certain privileges are secured to the company, exonerate the company from the payment of an *ad valorem* tax on its property, horses, stables, and shops, which are assessable for municipal purposes.[4] So the property of *gas companies* and of *water companies* within the municipality are, ordinarily, taxable by it.[5]

§ 629. A general statute of the state provided that the capital stock of the State Bank should be taxable *only for state purposes*, and afterwards a city corporation undertook to levy

[1] St. Louis *v.* Wiggins Ferry Company, 40 Mo. 580, 1867.

[2] Street Railroad Company Appeal, 32 Cal. 499, 1867; City Gas Company *v.* Thurber, 2 Rh. Is. 15, 21, 1851, where gas pipes in streets were taxed as real estate. Compare Gas Company *v.* County, 30 Pa. St. 232. See, also, Railroad Company *v.* Charlestown, 8 Allen, 330; Railroad Company *v.* Wright, 2 Rh. Is. 459; City Railway *v.* Louisville, 4 Bush (Ky.), 478. *Ante*, chapter on Streets, Sec. 571, p. 546, n.

[3] State *v.* Herod, 29 Iowa, 123, 1870. *Ante*, Sec. 571.

[4] City Railway Company *v.* Louisville, 4 Bush (Ky.), 478.

[5] Commonwealth *v.* Lowell Gas Company, 12 Allen, 75. Pipes laid in the streets of a city by a gas company, under a grant in their charter, are fixtures, and taxable as real estate: Providence Gas Company *v.* Thurber, 2 Rh. Is. 15, 1851. But see Gas Company *v.* County, 30 Pa. St. 232, 1858. Lessee and proprietor of city water works for a term of years, whose contract of lease did not stipulate for exemption from city taxation, was held taxable in respect to such works, they being treated as real estate: Stein *v.* Mobile, 24 Ala. 591, 1854. S. P. in Stein *v.* Mobile, 17 *ib.* 234.

and collect a municipal tax on certain real estate owned by the bank and forming a part of its capital stock; but this, it was adjudged, could not be done, the city and its powers being entirely under the control of the legislature.[1]

[1] State Bank *v.* Madison, 3 Ind. 43, 1851; Same *v.* Brackenridge, 7 Blackf. (Ind.) 395, 1845. See, also, Gardner *v.* State (holding under a charter that a state tax was in lieu of all local taxes), 1 Zabr. (N. J.) 557. So, in Louisiana, a restriction upon the state in reference to the taxation of banks was held to extend to municipal corporations deriving their authority from the state: New Orleans *v.* South Bank, 11 La. An. 41; Municipality *v.* Bank, 5 *ib.* 394; New Orleans *v.* Bank, 10 *ib.* 735; New Orleans *v.* Bank, 15 *ib.* 89. A village corporation was authorized "to raise money by a tax to be assessed upon the freeholders and *inhabitants*, according to law," and it was decided that a banking corporation located and doing business in the village was an *inhabitant*, and taxable: Ontario Bank *v.* Burnell, 10 Wend. 186, 1833.

As to taxation of *banks and bank stock* by municipalities in which the banks are located: Madison *v.* Whitney, 21 Ind. 261; Evansville *v.* Hall, 14 Ind. 27; King *v.* Madison, 17 Ind. 48; Connersville *v.* Bank, 16 Ind. 105; State Bank *v.* Madison, 3 Ind. 43; Madison *v.* Whitney, 21 Ind. 261; Gordon *v.* Baltimore, 5 Gill (Md.), 231. Compare Gordon *v.* Appeal Tax Court, 3 How. (U. S.) 133; Bank *v.* Town Council, 10 Rich (South Car.), Law, 104; State *v.* City Council, 5 *ib.* 561 (dividends); Bank *v.* City Council, 3 *ib.* 342 (real property); Bulow *v.* City Council, 1 Nott & McCord, 527 (shares in United States Bank); Cherokee Insurance Company *v.* Justices, 28 Ga. 121; The Bank *v.* Mayor, &c. Dudley, 130, 1832. See Mayor *v.* Hartridge, 8 Ga. 23; Nashville *v.* Thomas, 5 Coldw. (Tenn.) 600, 1868; O'Donnell *v.* Bailey, 24 Miss. 386.

Municipal taxation of railroads: Railroad track and property held liable to municipal taxation in the towns or cities where situate: Railroad Company *v.* Wright, 5 Rh. Is. 459; approved, Railroad Company *v.* Connelly, 10 Ohio St. Rep. 159, 164. To same effect: Railroad Company *v.* Clute, 4 Paige, Ch. 384; Wheeler *v.* Railroad Company, 12 Barb. 227; Railroad Company *v.* County of Morgan, 14 Ill. 163. And such property is subject, also, to special taxes and assessments: Railroad Company *v.* Connelly, 10 Ohio St. 159–164, 1859; Railroad Company *v.* Spearman, 12 Iowa, 112. Further, as to the liability, under special statute or charter provisions, of *railroads*, their property and stock, to municipal taxation: Davenport *v.* Railroad Company (rolling stock and real estate), 16 Iowa, 348. The views of *Wright*, C. J., and *Dillon*, J., were subsequently adopted by the court in a recent case not yet reported: Railroad Company *v.* Alexandria, 17 Gratt. (Va.) 176; Railroad Company *v.* Lafayette, 22 Ind. 262, 1864, as to power and mode of taxing railroads in Indiana; Railroad Company *v.* State (rolling stock), 25 Ind. 177; Applegate *v.* Ernst, 3 Bush (Ky.), 648; Rome Railroad Company *v.* Rome, 14 Ga. 275; Augusta *v.* Railroad Company, 26 Ga. 651, 1858; Richmond *v.* Daniel, 14 Gratt. (Va.) 385, 1858; Baltimore *v.* Railroad Company, 6 Gill (Md.), 288; North Mo. Railroad Company *v.* Maguire, Supreme Court Mo. 1872, not yet reported.

§ 630. The legislature may authorize municipal corporations to impose taxes upon persons whose *ordinary avocations are pursued within the corporate limits*, although residing beyond those limits, the same as upon residents.[1]

§ 631. The power to tax must be fairly and impartially exercised by the municipal authorities who cannot *discriminate between residents and non-residents* by taxing the property of the latter within the corporation at a higher rate, or in a different manner, from the like property of the former.[2]

§ 632. The usual provisions in the constitutions of the different states concerning taxation do not prohibit the legisla-

Choses in action, &c.: In Johnson *v.* Oregon City, 2 Oregon, 327, 1868, notes and mortgages belonging to a resident inhabitant were held taxable, although deposited outside of the city. But in Johnson *v.* Lexington, 14 B. Mon. 648–661, 1854, authority to a municipality to tax real and personal property was held limited to visible property actually situated within it, and *not to extend to debts and choses in action.* See, in same state, Louisville *v.* Henning, 1 Bush (Ky.), 381, as to taxability of money and things in action. Power to a municipality "to levy and collect a tax upon every species of property, real and personal, within the city, subject to taxation by the laws of the state," was held, in Georgia, to give no authority to levy a tax upon *notes* belonging to a resident, and within the city, where the makers do not reside therein: Bridges *v.* Griffin, 33 Ga. 113, 1861. Power to tax *all personal estate* gives authority to tax *money loaned:* Trustees *v.* McConnel, 12 Ill. 138, 1850.

[1] Worth *v.* Fayetteville, 1 Winst. (North Car.) part II. 70, 1864. What property may be taxed under such authority: *Ib.* As to right to tax (under special charter provisions) persons residing without, but exercising a trade or calling *within*, the corporation, see, also, State *v.* City Council, 2 Speers (South Car.), Law, 623; *ib.* 719. What may be taxed under authority to tax "income and profits" of non-residents doing business within the corporation, see City Council *ads.* State, 2 Speers (South Car.), Law, 719. Taxableness of goods owned elsewhere, but *sold on commission* by residents of the municipality: Cumming *v.* Mayor, R. M. Charlt. (Ga.) 26; Green *v.* Mayor, *ib.* 368; Paddleford *v.* Mayor, 14 Ga. 438, criticising Brown *v.* Maryland, 12 Wheat. 419; Peace *v.* Augusta, 37 Ga. 597.

[2] City Council *ads.* State, 2 Speers (South Car.), Law, 719, 1844; Nashville *v.* Althrop, 5 Coldw. (Tenn.) 554, 1868. In this last case it was held that there could be no discrimination between merchants selling by sample and those doing business in a different manner: Statutes authorizing the "registration and taxation" of vehicles using the paved streets of a town are strictly construed; and such an act was held not to extend to non-residents: Bennett *v.* Birmingham, 31 Pa. St. 15, 1850. *Ante*, Secs. 540, 604.

tures from imposing, or authorizing municipal authorities to impose, *taxes upon trades, special professions, and occupations.*[1]

§ 633. The extent of the power of the legislature over municipal corporations generally,[2] including the power to *fix and change the corporate boundaries*,[3] has been before adverted to. Where the boundaries have been originally fixed or subsequently changed so as to include within them *rural or agricultural lands* which have never been platted, are not needed for town lots, and which receive no direct benefit from the municipal government or expenditures, questions have arisen respecting the right to *subject such lands to ordinary municipal taxation.* The power of the legislature to fix or enlarge the

[1] Sacramento *v.* Crocker, 16 Cal, 119; Simmons *v.* State, 12 Mo. 268; Gilkerson *v.* Justices (taxation of offices), 13 Gratt. (Va.) 577, 1856; Selectmen *v.* Spalding, 8 La. An. 87, taxability of "floating palaces," or boats for circus exhibitions, affirmed: *Ib.*; Nashville *v.* Althrop, 5 Coldw. (Tenn.) 554; Mason *v.* Lancaster (tavern keeper), 4 Bush (Ky.), 406; The Germania *v.* The State (taxation of amusements), 7 Md. 1; Sears *v.* West (billiard tables), 1 Murph. (North Car.) 291; Commissioners *v.* Patterson (tax on retailers, &c.), 8 Jones (North Car.), Law, 182; Keller *v.* State (taxation by license on beer manufacturers), 11 Md. 525; 31 Iowa, 493; *Ib.* 102.

"The power of the state to tax professions is unquestioned (Simmons *v.* State, 12 Mo. 268), and the state may delegate the authority [to municipal corporations], but it should be done in clear and unambiguous terms." *Per Wagner*, J., St. Louis *v.* Laughlin, Supreme Court of Missouri, March term, 1872, not yet reported. A provision in the charter of a city giving it power to license, regulate, and tax certain enumerated classes of persons and business, and concluding with the words "and all other business, trades, avocations, and professions whatever," was held not to confer the power to require a license tax from lawyers, as they were not of the same generic character or class with those specified · *Ib.*

Under authority to collect taxes on "auctioneers, transient dealers, and pedlars," a municipal corporation may impose a tax either upon the amount of the sales of such persons, or in the form of a license or tax upon the privilege of selling: Carroll *v.* Mayor, &c. 12 Ala. 173, 1847. In exercising this discretion it is safer for the corporation to adopt the mode, if any, by which such persons are taxed by the state law. Brokers, who may be taxed as: Portland *v.* O'Neill, 1 Oregon, 218.

The right to impose *specific taxes* is recognized by the constitution of Michigan: Walcott *v.* People (taxation of express companies), 17 Mich. 68; Williams *v.* Detroit (paving tax), 2 Mich. 560; Woodbridge *v.* Detroit, 8 Mich. 274. In Wisconsin, see Kneeland *v.* Milwaukee, 15 Wis. 454.

[2] *Ante*, Chap. IV. p. 70, *et seq.*

[3] *Ante*, Chap. VIII. p. 165, Sec. 124; p. 167, Sec. 126; p. 168, Sec. 127.

corporate boundaries is not disputed, but it is the power to require *such* lands to contribute to the municipal treasury that has been controverted. In Kentucky[1] (the decisions in which have been followed in Iowa) the principle has been adopted that the "courts will, in such cases, control and limit the taxing power to that point or line where it ceases to operate beneficially to the proprietor in a *municipal point of view*."[2] The general rule is that the right to subject real property to municipal taxation extends only to such as has been surveyed and platted into lots, but the right to tax *may*, under circumstances, extend to property which has never been platted.

[1] Cheaney *v.* Hooser, 9 B. Mon. 330; Sharp *v.* Dunoven, 17 *ib.* 223; Maltus *v.* Shields, 2 Met. (Ky.) 553; Southgate *v.* Covington, 15 B. Mon. 491, 1854. The legislature may tax suburban property, within city limits, as such, to support needed local government and the enforcement of police regulations *in and about the property taxed;* but it cannot embrace such property within corporate limits merely for revenue purposes, in order to lessen the burden of others: Arbegust *v.* Louisville, 2 Bush (Ky.), 271, 1867.

[2] Langworthy *v.* Dubuque, 16 Iowa, 271, *per Lowe*, J.; approved, Fulton *v.* Davenport, 17 Iowa, 407. The most recent cases in the Supreme Court of Iowa, Durant *v.* Kauffman and Mitchell *v.* Davenport, June term, 1872, declare an adherence to the rule established by the previous cases, but evince no disposition to extend the exemption from municipal taxation. C. J. *Beck*, in the course of his opinion, remarks: "The mere fact that lands are included within the limits of a municipal corporation does not authorize their taxation for general city purposes. Under certain conditions, they are exempt therefrom. These conditions are such that the property proposed to be taxed derives no benefits from being within the city limits. This is the rule recognized by the various decisions of this court upon this subject. To enable us correctly to apply the rule above stated, we must consider and determine the character of the benefits which will render lands within a city liable to general municipal taxation. These are not such as attach to all lands near to a city or large town whereby they are rendered more valuable, but are such as accrue to the lands considered as city property. Lands lying contiguous or near to a city, though incapable of any use except for agricultural purposes, are nevertheless of greater value on account of their location than those more remotely situated. Convenience to a market, &c., &c., adds to their value. Therefore, lands within a city kept and alone used for agriculture, and not capable of being used as city property, and not demanded for that purpose, nor possessing a value based upon adaptation for the purpose of dwellings or business, cannot be considered directly benefited by the fact of their being within the city limits. Such lands should not be taxed for general municipal purposes. In determining the benefits accruing to such lands, a controlling fact to be considered is the purpose for which they are held.

§ 634. We deduce from the cases on this subject, in the states named, the following rules or *criteria* to determine the taxability of such lands: So long as the land thus embraced in the corporate limits is used solely for agricultural or horticultural purposes, or lies vacant and is not laid out into town lots, nor needed or required for streets or houses or other purposes of a town, nor benefited by being within the town, the corporation authorities cannot, for strictly corporate purposes, tax the property as town property, without the consent of the owner. But, on the other hand, when the property sought to be taxed is within the corporate limits in such close proximity to the settled and improved portions of the town or city, that the corporate authorities cannot open and improve the streets and alleys and extend its police regulations, &c., without incidentally benefiting the property and enhancing its value—where, in other words, the property is needed for buildings and houses, or is benefited by the local government—then the power to tax the same exists, though it may not actually be laid out into lots. With these rules, each case must be decided upon its special circumstances. If the owners have laid off the same into lots, it is to this extent clearly liable to municipal taxation. And property, though not liable to ordinary

If held as city property, to be brought upon the market as such whenever they reach a value corresponding with the views of the owner, they ought to be taxed as city property. There would neither be reason nor justice in permitting a proprietor of a large tract of land within a city to hold it for an opportunity to bring it into the market as city lots, and for no other purposes, under the pretence that it is agricultural lands, thus escaping taxation for the general improvement of the city—the very thing which will bring his lands into market, and thus add greatly to their value—a direct benefit to the owner. In such a case, the general improvement of the city, the building of streets near or in the direction of the lands so held, the construction of water works, public buildings, &c., &c., by which the prosperity of the city is advanced, and an invitation to population is held out, all bestow direct benefits upon the owner of such property. The lands being a part of the city, in fact, and held by their owner for the increase in value which he expects because they are city lots, are benefited by the municipal government, and share in the benefits derived by the expenditure of revenue raised by taxation. If property be so held within a city, whether it be sub-divided into lots, and streets thereon are dedicated to public use, or be inclosed and cultivated as agricultural lands, it ought to be subject to general municipal taxation. This result is directly deducible from the rule established by the decisions of this court."

municipal taxation, may yet be liable for road and school taxes, where the city or town is a road or school district, levying its own taxes for these purposes.[1]

§ 635. The power *to pave streets*, usually conferred in general but express terms, at the expense, in whole or in part, of

[1] See, in addition to the cases from Kentucky, the following: Morford *v.* Unger, 8 Iowa, 82 (the first and leading case in Iowa); followed by Butler *v.* Muscatine, 11 Iowa, 433; Langworthy *v.* Dubuque, 13 Iowa, 86; Same Case, more fully, 16 Iowa, 271; Fulton *v.* Davenport, 17 Iowa, 404; Buell *v.* Ball, 20 Iowa, 282, 1866; Railroad Company *v.* Spearman, 12 Iowa, 113; Deeds *v.* Sanborn, 26 Iowa, 419, 1868; S. C. 22 Iowa, 214; Deiman *v.* Fort Madison, 30 Iowa, 541, 1870; S. P. Bradshaw *v.* Omaha, 1 Neb. 16.

In Buell *v.* Ball, *supra*, *Cole*, J., in delivering the opinion, says: "The ground upon which courts interfere in such cases is, that private property shall not be taken for public use without just compensation. It is the fact of taking without compensation, and not the time or manner, which constitutes the infraction of the constitutional inhibition. The fact may be as effectually accomplished by an original incorporation as by an amendment, and the constitutional guaranty would be of little avail if it could be avoided by mere form." The Kentucky cases rest upon the same ground.

The practice of embracing within the corporate limits large tracts of land for the sole purpose of taxation is not unusual, and the doctrine adopted by these courts is the only way in which the proprietor can be relieved from a very unjust burden, and it works no wrong to the corporation, because the courts will fix the line of taxability upon an intelligent consideration of the circumstances of each case. In Benoist *v.* St. Louis, 15 Mo. 668, St. Louis *v.* Allen, 13 Mo. 400, and Same *v.* Russell, 9 Mo. 503, the only constitutional question decided was that the legislature had the power to extend the city limits and subject the property in the annexed territory to taxation, against the will or without the consent of the inhabitants affected thereby. In Barker *v.* State, 18 Ohio, 514, 1849, it was held (the constitutional question not being raised) that, for the improvement of streets, alleys, and sidewalks (the charter discriminating between this and a tax for "*corporation purposes*"), a municipal tax might be levied on *farming land*, not laid out into lots and recorded as such, if within the corporate limits. *Ante*, Sec. 126.

A provision in a charter extending the city limits, that land in the annexed territory, *used exclusively for farming purposes*, or *vacant and unoccupied*, should be taxed not exceeding a specified rate, construed, and it was held, not to be an exemption, and therefore to be strictly construed, but an equitable apportionment of burdens with reference to benefits, and the court regarded the *practical and beneficial use* to which the land was put, and not the purpose for which it was *held:* Gillette *v.* Hartford, 31 Conn. 351, 1863. Taxation of rural property in corporate limits for urban uses, see: New Orleans *v.* Michoud, 10 La. An. 763; Municipality *v.* Ursuline Nuns, 2 La. An. 611; Same *v.* Michoud, 6 *ib.* 605; Serrill *v.* Philadelphia, 38 Pa. St. 355.

the property benefited by the improvement, has given rise to some decisions which may be noticed. In holding that the power to *pave* includes the power to *gravel* streets, the Supreme Court of Illinois thus defines the word *pavement:* "A pavement is not limited to uniformly arranged masses of solid material, as blocks of wood, brick, or stone, but it may be as well formed of pebbles, or gravel, or other hard substances, which will make a compact, even, hard way or floor."[1]

§ 636. The power *to pave streets* includes the power to furnish and do all that is necessary, usual, or fit for paving;[2] and on this ground it has been held that the expense of *grading* a street preparatory to paving is incident to paving, and the expense properly included in the assessment.[3] And in Pennsylvania it is decided that the power to pave includes the power to furnish, or require the party at whose expense it is

[1] *Per Caton,* C. J., in Burnham *v.* Chicago, 24 Ill. 496, 1860. The word "pave" includes the usual means to cover with stone or brick, so as to make a level or convenient surface for horses, carriages, or foot passengers. It includes macadamizing: Warren *v.* Henly, 31 Iowa, 31. Authority to *pave* authorizes *sidewalk to be made of plank or other material,* in the discretion of the council: Railroad Company *v.* Mt. Pleasant, 12 Iowa, 112. Authority to a city to require abutting lot owners to "pave the street," includes, also, authority to require them to build sidewalks: Warren *v.* Henly, *supra.* In Louisiana, it is held that the power to make sidewalks, at the cost of the adjoining lot owners, includes the *guttering and curbing.* "By common consent," remarks the court, "it is considered that the term *pavement* embraces the brick sidewalks, of which the curb and gutters form a part:" O'Leary *v.* Sloo, 7 La. An. 25, 1852. In Powell *v.* St. Joseph, 31 Mo. 347, 1861, it appeared that the defendant corporation was authorized to assess the cost of paving streets to the owners of adjoining property in proportion to their fronts. This was held to authorize the city authorities to apportion the cost of *paving the street crossings,* as well as of such parts of the street as were in front of lots, among the lot holders of the adjoining blocks, in proportion to the front feet. Abutters may be assessed for *paving street crossings:* Creighton *v.* Scott, 14 Ohio St. 438; Williams *v.* Detroit, 2 Mich. 560, 1861. As to *paving intersections:* State *v.* Elizabeth, 1 Vroom (N. J.), 365, 1863.

[2] Schenley *v.* Commonwealth, 36 Pa. St. 29, 30, 60, 1859; McNamara *v.* Estes, 22 Iowa, 246, 1867. *Ante,* Sec. 397.

[3] State *v.* Elizabeth, 1 Vroom (N. J.), 365, 1863; Williams *v.* Detroit, 2 Mich. 560, 1861. *Ante,* Sec. 397.

done to pay for, *curbstones*.[1] And so as to *trimming* and *guttering*; these were held to be included in the power to *macadamize*.[2]

§ 637. Under an authority to make such by-laws as to the common council shall seem "necessary for the good government of the city, and for the regulation and paving of the streets and highways," a city corporation may pass an ordinance requiring the owner of every lot fronting on a designated section of a public street to fix curbstones and make a *brickway* or *sidewalk* in front of his lot. Such an ordinance is neither unconstitutional, illegal, nor unreasonable. It would doubtless be otherwise, it is remarked, if this burden was laid without special cause upon one citizen, all others similarly situated being exempted.[3]

[1] Schenley *v.* Commonwealth, *supra*. In this case the city of Allegheny was authorized "to grade and pave streets, sidewalks," &c. and to levy a special tax upon the lots fronting thereon to defray the expense. The question was made that the cost of *curbstones* was not a legitimate charge upon the lot owners. But the court held otherwise, observing that "the power to pave includes the power to furnish and do all that is necessary, usual, or fit for paving. How can the court say, as a legal proposition, that curbstones were neither necessary, customary, nor fit for such a work? Common observation shows that it is usual to employ curbstones when streets, sidewalks, or footways are paved, and that they are among the ordinary means used. But whether they are or not was a question for the jury:" See, also, Williams *v.* Detroit, 2 Mich. 560, 1861.

[2] McNamara *v.* Estes, 22 Iowa, 246, 1867; Williams *v.* Detroit, just cited. The substitution of new curbstones and gutters in a street were held to be "*repairs*:" People *v.* Brooklyn, 21 Barb. 484. *Supra*, Secs. 597, 619.

[3] Paxton *v.* Sweet, street commissioner of Trenton, 1 Green (N. J.), 196, 1832, cited with approval by *Putnam*, J., in Boston *v.* Shaw, 1 Met. 130–133, 1840. See Downer *v.* Boston, 6 Cush. 277, and observation (*arguendo*) of *Shaw*, C. J., p. 281, as to vacant lots. Assuming that the power was properly construed, the duty enjoined by the ordinance could not be enforced by a sale of the property unless authority to that effect was unequivocally conferred by the legislature. Construing certain acts *in pari materia*, the court held that the lessee for a long term of years, and not the owner of the fee, was the "proprietor" or "owner" to assent to, or petition for, the paving of streets: Holland *v.* Baltimore, 11 Md. 186, 1857. Tenant in dower in actual possession is an "owner" within the meaning of the charter requiring "owners" of lots to build sidewalks in front thereof: White *v.* Mayor, &c. 2 Swan (Tenn.), 364, 1852. Power to pave at the expense of the adjacent owner being limited and special, must be exercised strictly according to law: Henderson *v.* Baltimore, 8 Md. 352, 1855. *Supra*, Secs. 605–607.

As to right to *relief in equity* against illegal taxes and assessments, see Chap. XXII. *post*, Secs. 727–738.

§ 638. Under power to improve "any street," the city council is *not required* to improve *the entire length* of the street or none; it may improve part, and confine the assessment to the lots adjoining the part improved.[1]

§ 639. Where the *power* to pave depends upon *the assent or petition of a given number or proportion* of the proprietors to be affected, this fact is jurisdictional, and the finding of the city authorities or council that the requisite number had assented or petitioned is not *conclusive*, and the want of such assent makes the whole proceeding void, and the non-assent may be shown as a defence to an action to collect the assessment,[2] or

[1] Scoville *v.* Cleveland, 1 Ohio St. 133, approved and applied in Railroad Company *v.* Connelly, 10 Ohio St. 159–163; S. P. Creighton *v.* Scott, 14 *ib.* 438. See, also, St. Louis *v.* Clemens, 36 Mo. 467.

A town was empowered, "when requested in writing by the owners of two-thirds of the property on any street, or *part* thereof, to cause the same to be graded, and to levy the expense on the property bounding on such street," &c. Under this charter the Court of Appeals of Maryland decided that "the assent of the owners of two-thirds of the property on the whole line of the street to be improved was a pre-requisite to the exercise of the authority conferred upon the corporation. If a *part* only, is to be improved, the charter enables the corporation to grant an application made for that object by the owners of two-thirds of the property lying on that part, by an ordinance directing that particular part of the street to be improved. They can only order the *whole* street to be improved by an application from two-thirds of the property owners on the whole street." And it was held that where the town, on a petition of the owners of two-thirds of the property lying upon a *part*, only, of the street, improved the *whole* street, its action was unauthorized, and that it could not enforce the collection of the expenses of such improvement from the adjoining property owners: Swann *v.* Cumberland, 8 Gill (Md.), 150, 1849. May order sidewalk upon one side only: State *v.* Portage, 12 Wis. 562. Lot owner opposite a public common held, upon construction of the statutes, to be liable for the expense of grading and paving the *whole*, and not simply half, of the street in front of his lot: McGonigle *v.* Allegheny, 44 Pa. St. 118, 1862.

[2] Henderson *v.* Baltimore, 8 Md. 352, 1855; Carron *v.* Martin, 2 Dutch. (N. J.) 594, 1857; Camden *v.* Mulford, 2 Dutch. 49, reversing S. C. *ib.* 228; State *v.* Elizabeth, 1 Vroom (N. J.), 176, 1862; Bouldin *v.* Baltimore, 15 Md. 18, 1859; Holland *v.* Baltimore, 11 Md. 186, 1857; Kyle *v.* Malin, 8 Ind. 34; State *v.* Orange, 32 N. J. 49; State *v.* Hand, 2 Vroom (N. J.), 547; Baltimore *v.* Eschback, 18 Md. 276, 1861; Wells *v.* Burnham, 20 Wis. 112, 1865; Covington *v.* Casey, 3 Bush (Ky.), 698; Burnett *v.* Sacramento, 12 Cal. 76; Lexington *v.* Headley, 5 Bush (Ky.), 508; McGuinn *v.* Peri, 16 La. An. 326, 1861; People *v.* Rochester, 21 Barb. 656; Street Case, 16 La. An. 393; Litchfield *v.* Vernon, 41 N. Y. 123, 1869; Louisville *v.* Hyatt, 2 B. Mon. 177, 1841; St. Louis *v.* Clemens, 36 Mo. 467, 1865. See, *ante*, Chap. XIV. Secs. 400–402.

may, it has been held, be made the basis for a bill in equity to restrain a sale of the owners' property to pay it.[1] Accordingly, where a charter provided that "the city council should have full power to procure all streets to be improved in any manner they may deem advisable, at the expense of the property owners; and that a petition in writing to the council of the owners of the larger part of the ground between the points to be improved should be sufficient to authorize the council to contract for such improvements: provided, further, that the council, by a vote of all the members-elect, may cause such improvements to be made without petition or consent," it was held that an ordinance authorizing such work not enacted at the instance of the property holders, nor on the unanimous vote of the council, was insufficient to fix the liability of the lot owners.[2]

§ 640. So, where a statute enacted that "no contract should be made by the head of any department for work or materials for the city, unless for objects authorized by the city council," and the council authorized a department to contract for paving, with the condition that the *contractor be selected by a majority* of the owners of the front to be paved, and who were to pay the cost of the improvement, it was held that a selection of the contractor by a majority of the lot owners was essential to their liability to the contractor to pay for the paving, and that

[1] In Holland *v.* Baltimore, 11 Md. 186, 1857, the city was authorized to pave streets when the proprietors of the *majority* of the feet of ground fronting on any street should apply, in writing, therefor. Supposing that a majority of the proprietors had united in the application, but which afterwards turned out not to be true, in consequence of one of the signers not being, in law, a proprietor, the city paved a certain street, and, among others, paved in front of the plaintiff's lot, he not having signed the application. After the work had been done, the city sought to enforce the collection of the amount. Plaintiff applied for an injunction to restrain the sale of his lot to pay the assessment. The Court of Appeals held: 1. That if the requisite majority of owners did not apply, the whole proceedings were null and void. 2. That a non-assenting owner might (notwithstanding he did not apply for the writ until after the work was done) have an injunction to prevent the sale of his property to pay the unauthorized assessment: S. P. Bouldin *v.* Baltimore, 15 Md. 18. See 31 Iowa, 356, but *quære?*

[2] Covington *v.* Casey, 3 Bush (Ky.), 698. *Ante*, p. 273, Sec. 247.

the city, by adopting the work of a paver not thus chosen, could not oblige the lot owners to pay for it.[1]

§ 641. By one section of the organic law of a city it was authorized, on the *petition of two-thirds* of the owners of the abutting property, to make improvement of its streets; by a subsequent section, power was conferred upon the council to order such improvements by a *two-thirds vote of the council.* It was held that although proceedings relative to the improvement were commenced by petition from the property holders, yet, having been ordered by a two-thirds vote of the council, they were valid, although two-thirds of the property owners may not have united in the petition for the improvement—the two-thirds vote of the council made the proceedings valid, notwithstanding any defect in the prior proceedings of the petitioners.[2]

§ 642. It depends upon the provisions of the special charter or legislative act, whether or not *notice to the abutter* or proprietor is necessary in order to make him liable to pay the expense or cost of the local improvement, and in what manner it shall be given. It is sometimes a condition precedent to the authority to make the assessment and sometimes not. The cases in the notes will illustrate the views of the courts under various enactments.[3]

[1] Reilly *v.* Philadelphia, 60 Pa. St. 467; distinguished from City *v.* Wister, 11 Casey, 427, and City *v.* Burgen, 14 Wright (Pa.), 539.

[2] Indianapolis *v.* Mansur, 15 Ind. 112, 1860.

In a very recent case, under the general incorporation act of that state (see *ante*, p. 59, note), it is held that the council of a city may, by a two-thirds vote, without any petition, cause the grade of a street which has been improved, such improvements having been paid for by the owners of the property bordering on such street, and is in good repair, to be changed, and the street as so changed to be improved, and may pay the damages occasioned by the change out of the general revenue of the city, and assess the expense of the improvement against the owners of the adjoining property, or cause such expense to be paid out of such general revenue: Lafayette *v.* Fowler, 34 Ind. 140. *Supra*, p. 569, note; Sec. 619.

[3] Ordinance requiring owners to repair street passed without requisite notice, void, and the owners not liable either on contract or *quantum meruit:* Cowen *v.* West Troy, 43 Barb. 48; Brewster *v.* Newark, 3 Stockt. Ch. (N. J.) 114; State *v.* Hudson, 5 Dutch. 475; reversing S. C. *Ib.* 104; State *v.* Perth Amboy, 5 Dutch. 259. See, also, Myrick *v.* La Crosse, 17 Wis.

§ 643. If the legislature *has required notice* and provided *how it shall be given*, that mode must be pursued.[1] Where the statute provides for a notice by advertisement, or otherwise, a notice by publication is sufficient.[2] Where, by charter, a city is authorized to levy a special tax on lots for grading, &c., and "to collect the same under such regulations as may be prescribed *by ordinance*," and the ordinance passed in pursuance thereof provided that the resolution of the council levying such tax should be *published* in the official paper of the city, and that thereupon the tax should be due and payable, such publication is necessary to the validity of the tax, and without it the corporation cannot enforce the payment thereof.[3] The notice to proprietors to make a local improvement, if there be no charter provision to the contrary, may, it has been held in Missouri, be contained in an ordinance directing the work to be done, of which ordinance the proprietors are bound to take notice.[4] In a case in Connecticut, the charter of a city, in

442; Rathbun *v.* Acker, 18 Barb. 393; Risley *v.* St. Louis, 34 Mo. 404; Palmyra *v.* Morton, 25 Mo. 593; Washington *v.* Mayor, 1 Swan (Tenn.) 177; Whyte *v.* Mayor, 2 *ib.* 364; Ottawa *v.* Railroad Company, 25 Ill. 43; Jenks *v.* Chicago, 48 Ill. 296; Himmelman *v.* Oliver, 34 Cal. 246.

Notice held *not* essential to authority to make assessment: Finnell *v.* Kates, 19 Ohio St. 405; distinguished from Welker *v.* Potter, 18 Ohio St. 85. *Requisites of notice* to abutter to make local improvement: Tufts *v.* Charlestown, 98 Mass. 583; Ottawa *v.* Macy, 20 Ill. 413; Simmons *v.* Gardner, 6 Rh. Is. 255; Baltimore *v.* Bouldin, 23 Md. 328, 1865. Notice to "repave" is not sufficient where the assessment is for "paving," the works being different —as to converse, *quære?* State *v.* Jersey City, 3 Dutch. (N. J.) 536, 1859. Notice of *assessment:* Lowell *v.* Wentworth, 6 Cush. 221; Williams *v.* Detroit, 2 Mich, 560, 1861. Notice of *confirmation* of report of commissioners: State *v.* Jersey City, 3 Dutch. 536. Notice of time and place of hearing *objection* to proposed improvement: State *v.* Jersey City, 2 Dutch. (N. J.) 444; State *v.* Jersey City, 1 *ib.* 309; State *v.* Jersey City, 4 Zabr. 662; State *v.* Newark, 1 Dutch. 399; State *v.* Elizabeth, 2 Vroom, 547. Waiver of such objections: State *v.* Jersey City, 2 Dutch. 444.

[1] *Ante*, chapter on Eminent Domain, p. 454, Sec. 471.

[2] State *v.* Jersey City, 4 Zabr. (N. J.) 662, 1855. *Ante*, Sec. 471.

[3] Duhuque *v.* Wooten, 28 Iowa, 571, 1870.

[4] Palmyra *v.* Morton, 25 Mo. 593, 597, 1857.

As to *notice and mode of giving the same* by publication or otherwise, see Simmons *v.* Gardner, 6 Rh. Is. 255; Scammon *v.* Chicago, 40 Ill. 146; Risley *v.* St. Louis, 34 Mo. 404; Hildreth *v.* Lowell (sewer), 11 Gray, 345; Williams *v.* Detroit, 2 Mich. 560, 1861; State *v.* Elizabeth, 1 Vroom, 365; Durant *v.*

effect, provided that the council might order the adjoining "proprietor" to build a sidewalk, failing to do which, the city might build it at his expense, and the same should be a "lien upon the property and foreclosed as a mortgage;" and it was held that a *prior mortgagee* of the lot owner was not entitled to *notice* to build the sidewalk; that his interest in such a proceeding was necessarily connected with the interest of the mortgagor, and that he was liable to be foreclosed of his interest to redeem, unless he paid the expenses of making the sidewalk.[1] If proper notice is not given, *certiorari* lies to remove the record of the proceedings from before the city council into the proper court, where, if they are substantially defective, they will be quashed.[2]

§ 644. Authority to a municipal corporation, by its charter, to repair and keep in order its streets, is sufficient, without special grant, to authorize it to *construct drains and sewers*, and, when constructed, the corporation will incidentally possess the power to pass ordinances regulating their use and the price at which private persons may tap them, and also to protect them against injury or invasion.[3]

Jersey City, 1 Dutch. 309; State *v.* Jersey City, 4 Zabr. (N. J.) 662, in which, on *certiorari*, it was held that where a municipal corporation exercises the power to make improvements, and assess the expenses thereof upon the lands benefited thereby, the owners of lands assessed for such improvements, if accessible by reasonable diligence, are entitled to reasonable notice of the meeting of the commissioners for assessing the expenses, and this although the charter is silent on the subject of notice.

[1] Norwich *v.* Hubbard, 22 Conn. 587, 1853.

[2] Ottawa *v.* Railroad Company, 25 Ill. 43, 1860. Failure, after notice, to object to an assessment before the city council, when it has the power to revise and correct, or annul it and direct a new assessment, will be held in equity when the party applies for an injunction to restrain the collection of the assessment as a waiver of all irregularities in the exercise of the power: *Ib.* *Post*, Sec. 738, note; Sec. 743, note.

As to remedy by *certiorari* and injunction, see chapter on Remedies Against Illegal Corporate Acts, *post*, Sec. 727, *et seq.*

[3] Fisher *v.* Harrisburg, 2 Grant (Pa.), Cas. 291, 1854; Cone *v.* Hartford, 28 Conn. 363, 1859. Construction of power; right to change, &c.: Borough *v.* Shortz, 61 Pa. St. 399; Stroud *v.* Philadelphia, *ib.* 255; State *v.* Jersey City, 1 Vroom (N. J.), 148; State *v.* Jersey City, 5 Dutch. (N. J.) 441; State *v.* Jersey City, 3 *ib.* 493. *Ante*, Secs. 539, 544.

§ 645. It has been decided, in Massachusetts, that authority to make needful and salutary by-laws, or, perhaps, authority to make regulations for the public health, will, in the absence of more specific power, authorize a city to construct a common sewer, and subject the owner of the lots or land abutting, and who use the sewer, to contribution for the expenditure. But this contribution must be apportioned equally and fairly, or it cannot be recovered by the city, either by virtue of the ordinance which imposes it, or on an *indebitatus* count in the absence of express promise. The apportionment should be made upon the value of the *land*, *independently of the buildings*, and should be settled at the time of the transaction; and an ordinance contravening these principles and requiring every person connecting with the common sewer to pay his just proportion of the expense of making the sewer, having reference, always, to the last *valuation* of such person's *estate* in the assessor's books, previous to the expenditure, is void for inequality and unreasonableness.[1]

[1] Boston *v.* Shaw, 1 Met. 130, 1840. After this decision, the legislature of Massachusetts passed an act (Stat. 1841, Chap. CXV. Genl. Stats. 1860, p. 254, Sec. 4) giving general authority to cities to construct drains or common sewers, and providing "that every person who enters his particular drain into the main drain or common sewer, or who, by more *remote* means, receives a benefit thereby for draining his cellar or land, shall pay to the city or town his proportional part of the charge of making or repairing the same," &c. A by-law apportioning the assessment for building a drain according to the value of the lands benefited, independently of improvements thereon, was held valid; and the "remote benefit" spoken of by the statute was considered to "mean the increased value given to vacant and unimproved lots by this *privilege* of letting in drains from them in case buildings should subsequently be erected. An assessment upon the proprietors of land so situated that it is, or may be, benefited by the sewer, is just and equal," although it is at the time vacant territory. The proprietor of the land is liable to be charged, "although he never actually uses the drain; perhaps not, if there is no prospect of the possibility of benefit." But it does not invalidate an assessment that the greater part of one lot assessed is lower than the bottom of the sewer, as it might, and probably would, be graded so as to receive as much benefit as other lots: Downer *v.* Boston, 7 Cush. 277, 1851. S. P. and affirming the validity of the act of 1841, above cited, see Wright *v.* Boston, 9 Cush. 233, 1852, and note reference to People, &c. *v.* Mayor, &c. of Brooklyn, 6 Barb. 209, which was overruled, 4 N. Y. 419; Patton *v.* Springfield, 99 Mass. 627.

§ 646. Where the power to *make sewers* was held to be derived as an incident to the power of repairing highways, the court expressed the opinion that the common council were not authorized to construct sewers for the mere private convenience or benefit of particular individuals; and that they could (under such circumstances) "be lawfully made only when the commodiousness of the highway for its proper purposes, and its safety, and the healthfulness of the vicinity require them." [1]

§ 647. If there be no special *constitutional limitation, the cost of making sewers* for the public convenience may be directed by the legislature to be paid out of funds provided by general taxation, or to be assessed upon the abutters, or the property specially benefited.[2]

§ 648. Power to a municipal corporation to make local improvements, though the expense be directed in the constituent act to be assessed upon the property benefited, gives the corporation the implied power to make *general contracts therefor*.[3] But as to agreements made between the corporation and a contractor to do the work, the *abutters* or property owners on whom the expense falls are not parties, but are brought into *direct* relation with the proceedings for the local improvement for the first time when the assessment is made. The assessment is a tax levied by the corporation upon property to defray the expense of the improvement, and the suit to collect it (though brought by the contractor under authority given for that purpose) is not the subject of set-off or counter claim.[4]

[1] Cone *v.* Hartford, 28 Conn. 363, 375, 1859. "Laying out" of sewer defined; what property liable to assessment of benefits; defence to assessment because sewer is a nuisance, see *ib.*

[2] *Supra*, Secs. 596, 597, 598, 599; Stroud *v.* Philadelphia, 61 Pa. St. 255; Philadelphia *v.* Tryon, 35 Pa. St. (11 Casey) 401; Hildreth *v.* Lowell, 11 Gray, 345; Wright *v.* Boston, 9 Cush. 233; State *v.* Jersey City, 5 Dutch. (N. J.) 441; Cone *v.* Hartford, 28 Conn. 363–374. An arbitrary rule apportioning cost according to frontage alone, disapproved: Clapp *v.* Hartford, 35 Conn. 66; State *v.* Hudson, 5 Dutch. (N. J.) 104, 1860.

[3] Cummings *v.* Mayor of Brooklyn, &c. 11 Paige, 596, 1845.

[4] Himmelman *v.* Spanagel, 39 Cal. 389; Same *v.* Cofran, 36 Cal. 411; Meuser *v.* Risdon, *ib.* 239; Emery *v.* Gas Company, 28 *ib.* 345. But a defence good against the city is good against the contractor: St. Louis *v.* Clemens, 36 Mo. 469, 1856. *Ante*, Secs. 383, 388, 397, 400.

But although the property owners are not privies or parties to such contracts, yet, to a certain extent, and in a substantial sense, the municipality is their agent, and since the burden to pay rests upon them, they have a right to insist on a faithful performance of the contract, and the corporate authorities cannot dispense with such performance.[1]

§ 649. To entitle a *municipal corporation to recover* from the abutter the expense of constructing a sidewalk, or other local improvement, it *must comply with all conditions precedent*, whether prescribed by charter or ordinance.[2] Therefore, if the order of the city council requires the sidewalk to be built *on the side* of a certain street, the city cannot recover of the lot owner an assessment for building a sidewalk several feet from the side of such street.[3] And where the ordinances of the city provide that sidewalks shall be constructed of such materials as the city council may order, the city cannot recover an assessment unless the council has prescribed the kind of materials out of which it should be built.[4]

§ 650. In Missouri, in actions to recover the amount charged against a lot for local improvements in front thereof, the liberal doctrine is adopted, that a *substantial compliance* with the law is sufficient, and it is not necessary for the city to prove a strict compliance with directory ordinances on the subject, but the lot owner or defendant may show a neglect of

[1] Bond *v.* Newark, 19 N. J. Eq. 376, 1869; Lake *v.* Williamsburg, 4 Denio, 523; St. Louis *v.* Clemens, 36 Mo. 467. As to liability of the municipal corporation to the contractor, see chapter on Contracts, *ante*, p. 390, Sec. 400.

[2] Lowell *v.* Wentworth, 6 Cush. 221, involving validity of notice of assessment; Same *v.* French, *ib.* 223. Construction of charter as to "temporary" or "permanent" sidewalks, and as to what constitutes an "acceptance" thereof by the city: Lowell *v.* Wheelock, 11 Cush. 391, 1852. If the charter provides that sidewalks may be constructed by the city "at the expense of the lot owner," and points out no specific remedy, a civil action lies to recover the amount: Lowell *v.* Wyman, 12 Cush. 273–276, 1853. "The power of charging the expense of sidewalks on the owners of the adjoining land, is a high power, and is not to be extended by construction: *Per Metcalf*, J., in Lowel *v.* French, 6 Cush. 223, 224.

[3] Lowell *v.* Wheelock, 11 Cush. 391, 1853.

[4] *Ib.* The order should appear on the journal of their official proceedings: *Ib.* *Ante*, p. 108, Sec. 60; p. 588, Sec. 618.

duty by the authorities, and if he was injured thereby it will constitute a defence. If the work has been done in a manner satisfactory to the corporation, and has been accepted by it, a *prima facie* case is made out.[1]

§ 651. The legislature may provide *summary collection* of taxes and assessments, and declare what shall make a *prima facie* case.[2] For the payment of street improvements, it was provided by statute that the city engineer should make an estimate, which, when the council directed it to be paid, became an assessment upon the particular lot or property to which it was chargeable. It was further provided that if it should appear to the council by affidavit that such assessment was not paid, the council should provide for its collection by precept issued by the mayor and clerk. It was contended that this statute was unconstitutional, because it deprived a party of rights without a judicial hearing, and because it invested the council with judicial power. But the court held that inasmuch as the party had the right by appeal to transfer his cause to a judicial tribunal, the objection to the statute was not well taken, and that the issue of the precept was a ministerial, and not a judicial, act.[3]

§ 652. The original assessment for a local improvement proving insufficient, the legislature may *constitutionally authorize a re-assessment* and make it operate upon the property benefited, that is, upon all that was originally liable to contribute; and such a law is valid, even against the party purchasing intermediate the assessment and re-assessment. Vested rights are not thereby impaired.[4]

[1] Risley *v.* St. Louis, 34 Mo. 404, 1864; St. Joseph *v.* Anthony, 30 Mo. 537, 1860; St. Louis *v.* De Noue, 44 Mo. 136; St. Louis *v.* Clemens, 36 Mo. 467. In an action to recover local assessments, in the absence of proof of fraud, the *acceptance by the corporation* of work it was authorized to contract for, is *prima facie* evidence against the defendant, so far as relates to its completion, and the manner in which it was done: Municipality *v.* Guillotte, 14 La. An. 297, 1859. *Ante,* Secs. 386, 387.

[2] St. Louis *v.* Coons, 37 Mo. 44, 1865.

[3] Flournoy *v.* Jeffersonvile, 17 Ind. 169, 1861; *ib.* 175. *Ante,* Sec. 387.

[4] Butler *v.* Toledo, 5 Ohio St. 225, 1855; Schenley *v.* Commonwealth, 36 Pa. St. 29, 1859; Meuser *v.* Risdon, 36 Cal. 239. *Ante,* p. 92, Secs. 45, 46, and

§ 653. *Mode of Collection.*—If the charter gives to a municipal corporation a specific and complete remedy for the collection of taxes, as by a distress and sale of property, this will ordinarily be regarded as excluding by implication the right to resort to any other mode of enforcing the tax; but where the power to levy the tax is plainly given, the right to collect *by suit* should not be taken to be impliedly denied, unless the intention of the legislature, that the special mode prescribed should be the *only* mode, appears with reasonable certainty. If the specific remedy is full and adequate, such an intention on the part of the law-maker would be more readily deduced than it would under other circumstances.[1]

notes. Power of legislature to change mode of assessments as to uncompleted local improvements: Hines *v.* Leavenworth, 3 Kansas, 186, 1865. It is essential to the validity of a re-assessment for a local improvement that all the money to be collected under it shall have been *substantially* expended in the authorized improvement: Butler *v.* Toledo, 5 Ohio St. 225, 1855. Void assessment does not preclude a subsequent valid one: Himmelman *v.* Cofran, 36 Cal. 411, 1868. Further, as to new or re-assessment: Chicago *v.* Ward, 36 Ill. 9; Gurner *v.* Chicago, 40 Ill. 165; Beygeh *v.* Chicago, Supreme Court Illinois, September, 1871, 4 Chicago Legal News, 121, not yet officially reported. Power of city authorities to validate proceedings invalid in the first instance, denied: Meuser *v.* Risdon, 36 Cal. 239; Municipality *v.* Botts, 8 Rob. (La.) 198.

[1] Camden *v.* Allen, 2 Dutch. (N. J.) 398, 1857, citing Pierce *v.* Boston, 3 Met. 520, distinguishing Ohio *v.* Hibbard, 3 Ohio, 63, Ohio *v.* Gazley, 5 Ohio, 14; and holding that a tax is not a debt or in the nature of a debt, nor liable to set-off: 2 Dutch. 398, *per Green*, C. J. S. P. Denying that taxes are debts, for which, without a statute authority, actions may be maintained, see Pierce *v.* Boston, *supra;* Shaw *v.* Pickett, 26 Vt. 486, cited with approval by *Chase*, C. J., in Lane County *v.* Oregon, 7 Wall. 71, 80, 1868, *arguendo.*

Further, as to *personal liability:* Oakland *v.* Whipple, 39 Cal. 112; People *v.* Seymour, 16 *ib.* 332; Guerrin *v.* Reese, 33 *ib.* 292; Litchfield *v.* Vernon, 41 N. Y. 123, 1869; St. Louis *v.* Clemens, 36 Mo. 467; St. Louis *v.* De Noue, 44 Mo. 136. In the case of Taylor *v.* Palmer, 31 Cal. 240, 1866, the majority of the court held against a learned and strong dissent, that it was not within the power of the legislature, under the constitution, to make an assessment for street improvements, a personal charge against the owner for whatever sum may remain after a lien on the lot has been enforced. In the learned and strong dissenting opinion of *Sawyer*, J. *ib.* 666, the legislative practice and the decisions in other states are extensively referred to, and the authority of the legislature to make an assessment a personal charge, earnestly and ably maintained. *Supra*, Sec. 642, *et seq.*

On the principle that where a statute creates a liability which did not before exist, and gives a special remedy to enforce it, that remedy, and not

§ 654. On the principle that *the specific statute mode of collection* must be pursued, it was held, in another case, where the legislature had provided that a tax upon free persons of color removing to a city should be collected by hiring them out, that an ordinance authorizing such persons to be imprisoned for the non-payment of the tax was void.[1] So where the organic law of a town gave it power "to levy and collect taxes," and also provided, in another section, that "if any person fail to pay any tax levied on his property, the town collector may recover the same by civil action in the name of the corporation," it was held that the payment of taxes must be enforced by suit and that it was not competent for the corporation to pass an ordinance providing for their collection by seizure and sale, before judgment, since the mode of collection specified in the statute excluded all other modes.[2]

§ 655. The authorities, however, are not uniform, and in some of the states the view is taken that a tax legally levied and assessed by a municipal corporation pursuant to its charter creates a legal obligation to pay such tax, and that the city can *recover it in an action of assumpsit*, and this although there may be a summary mode of recovery provided for in the ordinance.[3]

a common law action, must be pursued, street assessments must be collected in the manner provided by the charter or constituent act of the corporation: Flournoy *v.* Jeffersonville, 17 Ind. 169, 1861; *ib.* 318. Precept must be duly signed by the proper officer: Jeffersonville *v.* Patterson, 32 Ind. 140. It was held by a divided court (ten senators to eight) that a county could not maintain a bill in equity in the nature of a *creditor's bill*, to enforce the payment of county taxes, where the warrant for the taxes was returned no property whereon to levy: Court of Errors, Durant *v.* Supervisors, 26 Wend. 66, 1841, reversing decree of chancellor and vice chancellor. *Post*, Secs. 727–738; *infra*, Sec. 660.

[1] Cooper *v.* Savannah, 4 Geo. 68, 1848.

[2] Alexander *v.* Helber, 35 Mo. 334, 1864. *Ante*, Sec. 273.

[3] Dugan *v.* Baltimore, 1 Gill & J. (Md.) 499; Mayor, &c. *v.* Howard, 6 Har. & J. (Md.) 383; Gordon *v.* Baltimore, 5 Gill (Md.), 236, 243; Eschbach *v.* Pitts, 6 Md. 71, 1854. In Dugan *v* Baltimore, *supra*, *Buchanan*, C. J., delivering the opinion of the court, said: "In the Mayor, &c. *v.* Howard, 6 Har. & J. 383, it was decided by this court, in relation to the 10th section of the act of incorporation, that the giving a remedy by distress or action of debt was cumulative only, and did not take away the action arising by implica-

§ 656. If the charter gives the power to impose taxes, but is *silent respecting the method for their recovery*, the corporation may enforce them, or provide by ordinance for their enforcement by due course of judicial proceedings. In such a case, the authority to collect by *suit* is clearly implied, being necessary in order to make the power to tax available. But the power to levy and collect a tax, whether general or special, does not carry with it the authority to collect *by distress or sale of property*, or in any way more summary than by resort to legal proceedings. The principle of the common law is clear, as we have already seen,[1] that municipal corporations cannot make a by-law (unless the power be plainly and directly conferred) to enforce the payment of fines by distress, sale, or forfeiture of the goods of the party who may have omitted to discharge his legal dues, and the same doctrine extends to taxes, when they are treated as debts. Municipal power to collect by distress and sale cannot be implied because the state collects *its* taxes in this manner. It must be given, if not in express terms, yet by the clearest and most indubitable implication.[2] Therefore, the power to sell for the non-payment of

tion, or the legal obligations to pay a claim created by law. The tax for which this suit is brought was imposed by virtue of that act, the imposition and assessment of which created the legal obligation to pay, on which the law raised an *assumpsit*, independent of the notice required by the 5th section of the ordinance, as a foundation for a summary mode of recovery, and unaffected by the omission of the collector to do his duty, which omission, though it caused the loss of the right to collect the tax by distress and sale of the goods, left the right to recover on the original implied *assumpsit* unimpaired — an *assumpsit* raised by the law on the imposition and assessment of the tax, and not to arise on the delivery by the collector of an account of the assessment and tax." S. P. State *v.* Southern Steamship Company, 13 La. An. 497, 1858; Dunlap *v.* County, 15 Ill. 9; Ryan *v.* County, 14 Ill. 83; Mayor *v.* McKee, 2 Yerg. (Tenn.) 167.

Mode of collection: Bond *v.* Hiestand, 20 La. An. 139; Louisville *v.* Bank, 3 Met. (Ky.) 148; New Orleans *v.* Graihle, 9 La. An. 561; Baltimore *v.* Chase, 2 Gill & J. (Md.) 376. *Supra*, Secs. 649, note, 654, note.

[1] *Ante*, chapter on Ordinances, Secs. 270–287; 341–355.

[2] Bergen *v.* Clarkson, 1 Halst. (N. J.) 352, 1796; Merriam *v.* Moody, 25 Iowa, 163, 1868; Mayor *v.* Howard, 6 Har. & J. 383; Dugan *v.* Mayor, 1 Gill & J. 499; Ham *v.* Miller, 20 Iowa, 450; Camden *v.* Allen, 2 Dutch. (N. J.) 398, 1857; Clerk *v.* Tucker, 2 Vent. 132; New Orleans *v.* Graihle, 9 La. An. 561; Baltimore *v.* Chase, 2 Gill & J. (Md.) 376; St. Louis *v.* Russell, 9 Mo. 503, 1845; St. Louis *v.* Allen, 13 Mo. 400, 1850; McInerny *v.* Reed, 23 Iowa,

taxes, general or special, cannot be inferred from an express provision in the charter to the effect that the collection of the taxes provided for therein shall be enforced in such manner as may be provided by the ordinances of the city.[1]

§ 657. While the power "to levy and collect taxes" will not alone confer the right upon the municipality to collect by a direct sale, yet these words may give such authority in connection with other charter provisions on the same subject which unequivocally and plainly assume and recognize the existence of a power of sale.[2]

§ 658. The principle is a familiar one, that the power to sell when given must be strictly pursued or the sales are void; and a party claiming title under a corporation tax sale, must, unless the rule is varied by legislative enactment, show that every prerequisite to the exercise of the power has been complied with.[3]

410, 1867; Haskell *v.* Burlington, 30 Iowa, 232, 1870; Paine *v.* Spratley, 5 Kansas, 525. The right to impose a fine or penalty for the non-payment of a tax must be plainly conferred, or it cannot be exercised by the corporation: Municipality *v.* Pauce, 6 La. An. 515, 1851.

[1] Merriam *v.* Moody, 25 Iowa, 163; Paine *v.* Spratley, 5 Kansas, 525; McInerney *v.* Reed, 23 Iowa, 410.

[2] St. Louis *v.* Russell, 9 Mo. 503, 1845; St. Louis *v.* Allen, 13 Mo. 400, 1850. In these cases it appeared that in the charter of St. Louis power was given "to levy and collect taxes," &c., and in another portion of the charter it was provided "that the mayor and city council shall have power, by ordinance, to direct the manner in which property advertised for sale, or sold for taxes, by authority of the corporation, may be redeemed," and it was held that the city might sell property for the non-payment of taxes. Compare, Merriam *v.* Moody, *supra.*

[3] Pope *v.* Headen, 5 Ala. 433, 1843; Underhill *v.* Smith (publication), Chip. (Vt.) 81, 1791; Bucknall *v.* Story (corporation tax deeds as evidence of title), 36 Cal. 67; Holroyd *v.* Pumphrey, 18 How. (U. S.) 69; Holbrook *v.* Dickinson, 46 Ill. 285. Effect of municipal tax deed being made *prima facie* evidence of title: *Ib.* Blackwell on Tax Titles, Chap. XXXI. Compliance with law must appear on the face of the proceedings: Chicago *v.* Wright, 32 Ill. 192; Sharp *v.* Spier, 4 Hill (N. Y.), 76, adjudging that a power to sell for *taxes* did not authorize a sale for a mere *assessment for benefit;* S. P. Sharp *v.* Johnson, 4 Hill, 92. In Doe *v.* Chunn, 1 Blackf. (Ind.) 336, 1825, it was held that express power to a municipal corporation to levy taxes and sell lands for the non-payment of them (the charter being silent as to conveyance to the purchaser), did not include the power to convey; but this view

§ 659. It is undoubtedly a sound proposition, that taxes, whether general or special, are not *liens* upon the property against which they are assessed, unless made so by the charter, or unless the corporation is authorized by the legislature to declare them to be liens.[1]

§ 660. Where the charter of a city conferred upon it the power "to levy and collect" a special tax for local improvements, and declared such tax to be "*a lien*" upon the real estate upon which it should be assessed, and no mode of collection was prescribed, and no power to collect by sale existed, the court was of opinion that the lien might be *enforced in equity*, and the power "to collect" be exercised by the corporation by a suit in its name, but it was held that suit could not be maintained in the name of an assignee of the corporation.[2]

may, perhaps, be considered too strict to be sound. At all events, this would not be law in any but a tax title case.

"Without express power given to *a municipal corporation*, by statute, to *become purchaser* at an authorized sale of lands [by it] for the non-payment of taxes, it possesses no such power, and a sale to it is void:" *Dixon*, C. J., in Knox *v.* Peterson, 21 Wis. 247, 1866. *Relief against illegal taxes and assessments: Post*, Chap. XXII. *Right to recover back: Post*, Chap. XXIII.

[1] Philadelphia *v.* Greble, 38 Pa. St. 339; Howell *v.* Philadelphia, *ib.* 471; Allegheny City's Appeal (*lien* of assessment), 41 Pa. St. 60. Authority to a city "to provide, by ordinance or otherwise, for the *prompt* collection of taxes due to the city, and to that end the city shall have power to sell *real* as well as personal property," authorizes it to pass an ordinance declaring taxes to be a lien on realty: Eschbach *v.* Pitts, 6 Md. 71, 1854, charter of Baltimore. See Dallam *v.* Oliver, 3 Gill (Md.), 445, 1845. Though a personal action may lie against the owner to recover the amount of a paving tax, yet this does not affect the specific liability of the property on which the tax is a lien or which may be sold to pay it: Eschbach *v.* Pitts, 6 Md. 71, 1854.

[2] McInerney *v.* Reed, 23 Iowa, 410, 1867. In Mayor, &c. of New York *v.* Colgate, 12 N. Y. (2 Kern.) 140, 1854, the lien of the city was created by statute, and the cumulative right to enforce it as a *mortgage* given, and the lien, it was held, was not discharged by a defective sale *in pais*. See, also, Norwich *v.* Hubbard, 22 Conn. 587, 1853. *Supra*, Secs. 637, note, 653.

A contractor, who, as the agent of the city, and by its authority, does paving under a contract with lot owners, will be *subrogated* to the rights of the city as to liens on the adjoining property, and may prosecute a suit in the name of the city for his use against the delinquent property: Philadelphia *v.* Wistar, 35 Pa. St. 427, 1860. But in Griffing *v.* Pintard, 25 Miss. 173, it was held that the doctrine of subrogation had no application to the rights and remedies of the state or city against delinquent tax payers.

The right of the owner to redeem from sales for municipal taxes and assessments, as well as from sales under the general tax laws, is favorably regarded by the courts; and statutes giving or extending this right are liberally construed. And it is held by the Supreme Court of Pennsylvania, that the right to redeem is, until the sale is fully consummated by deeds, wholly within legislative control, and that the redemption time may be enlarged after the sale is made and before the purchaser has obtained his deed.[1]

Suits for local assessments may be brought in the name of the corporation, although the charter directs that the board of trustees shall do the work and recover; the trustees are but the agents of the corporation: Palmyra *v.* Morton, 25 Mo. 593, 1857; North Liberty *v.* St. John's Church, 13 Pa. St. 104.

As to mode of collecting assessments for local improvements, and when considered a personal charge as well as a lien on the property benefited, see Bennett *v.* Buffalo, 17 N. Y. 383; Mayor, &c. *v.* Colgate, 12 N. Y. (2 Kern.) 140 (assessment for widening street); Salter *v.* Reed, 15 Pa. St. 260; Philadelphia *v.* Cooke, 30 *ib.* 56, 63; Guerrin *v.* Reese, 33 Cal. 292; Des Moines *v.* Casady, 21 Iowa, 570; Gaffney *v.* Gough, 36 Cal. 104; Britton *v.* Philadelphia, 32 Pa. St. 387.

[1] Gault's Appeal, 34 Pa. St. 95, 1859. See Adams *v.* Beale, 19 Iowa, 61.

CHAPTER XX.

MANDAMUS.

§ 661. This important subject, so far as it falls within the scope of the present work, will be considered in the following order:—

1. Definition and General Nature of the Remedy—Secs. 662–664.
2. When the Writ will be Granted or Refused—Secs. 665–668.
3. Mandatory and Discretionary Powers as Respects the Remedy by *Mandamus*—Secs. 669–673.
4. *Mandamus* as Respects Municipal Elections and Officers—Sec. 674, *et seq.*; To Take Office—Sec. 677; To Admit to Office—Secs. 678–682; To Restore to Office—Sec. 683.
5. To Obtain Possession and Inspection of Corporate Books and Papers—Sec. 684.
6. To Enforce Duties Towards Creditors—Secs. 685–693.
7. Application for the Writ—Affidavits—Relator—Rule—Secs. 694–697.
8. Form, Direction, and Service, of the Writ—Secs. 698–704.
9. The Return and Subsequent Proceedings—Secs. 705, 706.
10. Peremptory Writ—Secs. 707, 708.
11. Attachment—Secs. 709–711.
12. Judgment—Sec. 712.

Definition and General Nature of the Remedy.

§ 662. At *common law*, the superintending jurisdiction of the King's Bench over all public bodies, including municipal corporations, and over public officers, including the officers of such corporations, was largely exercised by means of the writ of *mandamus*, which is considered in England to be a preroga-

tive writ, and is in style an injunction in the king's name, commanding the corporation, officer, or person to whom it is directed to perform the specific duty therein commanded. It is in England, in connection with an information in the nature of a *quo warranto*, the principal remedy by which municipal corporations are compelled to observe the requirements of their charter and of the law; and whenever the law has not provided some other adequate or specific remedy to compel or secure the performance of their duties, such performance will be enforced by means of this writ in favor of the public or of any person having a right to insist upon such performance, and who would be injured by their non-performance.[1] It is, in substance, a civil remedy for the subject, though the name of the king be nominally used.[2]

§ 663. In *this country* the functions of the writ are fully as extensive as in England, although we have here given more scope to other remedies which often effect practically the same ends.[3] It is to the public advantage that municipal corporations and their officers shall be made to perform the duties enjoined upon them by law, and the necessity which has been felt for affording easy remedies against them has led the legislatures and the courts in modern times to improve and liberalize the proceedings by *mandamus*, by relieving them of much

[1] Commonwealth *v.* Pittsburg, 34 Pa. St. 496, 510, 1859; 3 Black. Com. 110; Rex *v.* Barker, 3 Burr. 1267; 1 W. Black. 352; Rex *v.* Commissioners, 1 Term. Rep. 148; People *v.* Collins, 19 Wend. 65; Selwyn's *Nisi Prius*, Chap. XXVIII, 1077–1100. "A *mandamus* is certainly a prerogative writ, flowing from the king himself, sitting in this court, superintending the police and preserving the peace of this country:" Rex *v.* Barker, *supra*, *per* Lord *Mansfield*.

[2] Stephens' *Nisi Prius*, 2291. This author's treatment of the subject of *Mandamus*, as the remedy is applied in England, is highly satisfactory.

[3] See, *post*, Chaps. XXII. XXIII. "*Mandamus*," says Mr. Justice *Thompson*, in commencing his valuable opinion in the Commonwealth *v.* Allegheny County, 37 Pa. St. 277, 279, 1860, "is a high prerogative and remedial writ, the appropriate functions of which are the enforcement of duties to the public, by officers and others, who either neglect or refuse to perform them. It follows, therefore, that those to whom it may be appropriately directed owe some duty to the public, and are under obligation to perform it, and for the enforcement of which there is no other specific legal remedy."

of their former artificial and technical character.[1] Accordingly, "it is," says a high legal authority, "well settled that a *mandamus* in modern practice is nothing more than an action at law between the parties, and is not now considered as a prerogative writ. The right to the writ, and the power to issue it, have ceased to depend on any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable. It is a writ to which every one is entitled, where it is the appropriate process for asserting the right he claims."[2]

§ 664. *Mandamus and injunction* are, in their nature, different remedies, and in general are not concurrent or interchangeable.[3] A writ of *mandamus* may be styled an injunction at law or a mandatory writ in a *legal* proceeding, commanding in the name of the sovereign authority the performance of a specific affirmative act. An injunction belongs to a court of equity, and usually issues to prevent the doing of some specific act. Where *mandamus* is the appropriate remedy, it cannot be substituted by a bill in equity praying an injunction — as, for example, to compel a municipality to levy a tax to pay a judgment against it.[4]

[1] Rex *v.* Barker, 3 Burr. 1265; Sikes *v.* Ransom, 6 Johns. 279; *Ex parte* Turner, 5 Ohio, 542.

[2] *Per Taney*, C. J., in Commonwealth of Kentucky *v.* Dennison, Governor, &c. 24 How. (U. S.) 66, 97, 98, 1860; Kendall *v.* United States, 12 Pet. 615; Kendall *v.* Stokes, 3 How. 100; *Ex parte* Fleming, 4 Hill (N. Y.), 581; State *v.* Bailey, 7 Iowa, 390; Bryan *v.* Cattell, 15 Iowa, 338, *per Wright*, J.; Commonwealth *v.* Allegheny County, 32 Pa. St. 218, 1858; State *v.* Kirkley, 29 Md. 85, 1868; Wilkinson *v.* Bank, 3 Rh. Is. 22.

[3] Walkley *v.* Muscatine, 6 Wall. 481, 1867. Thus *mandamus*, and not a bill in equity, is the proper remedy against the officers of a corporation to compel them to register a conveyance of shares: Cooper *v.* Dismal Swamp Canal Company, 2 Murphy (North Car.), 195. Remedy in equity; *Post*, Chap. XXII. So an injunction, and not *mandamus*, was considered to be the proper remedy to prevent the erecting, by the trustees, of a school house on a site selected in violation of law; but *mandamus* was regarded as the proper remedy to compel the trustees to carry out the decision of the superior school officer, on appeal, in relation to establishing a school house for the district: State *v.* Custer, 11 Ind. 210, 1858.

[4] Walkley *v.* Muscatine, 6 Wall. 481, 1867. See State *v.* Kirkley, 29 Md. 85, 110, 1868, in which it was held that *mandamus* was a proper remedy by a city to compel the delivery to it, by a building committee who were acting without legal authority, of the plans and specifications of the city hall,

When Granted or Refused.

§ 665. A writ of *mandamus* will be *granted against municipal corporations* and their officers whenever they refuse or unreasonably neglect to perform any duty clearly enjoined upon them by charter or statute or law, and there is no other specific legal remedy adequate to enforce the right of the public, or the specific legal right of the relator.[1] "Whenever," says Mr. Justice *Strong*, now holding a seat on the Supreme Bench of the United States, adopting the doctrine of the English law, "there is a clear legal right in the relator, a corresponding duty in the defendants, and the want of any other adequate and specific remedy," a writ of *mandamus* is the appropriate process.[2]

§ 666. If the statute prescribe a *specific remedy*, particularly if adequate in its nature, such a remedy is ordinarily, if not always, exclusive of *mandamus*, which will not in such case be granted; but if no particular remedy be given, and there is no other plain and effectual mode of relief, *mandamus* is proper in all cases where it is adapted to enforce the right and duty in question.[3] And it has repeatedly been held, both in England and in this country, that where there is a clear legal right in the relator, the writ will not be refused merely because there

and thus to restrain them in the discharge of the duties of their supposed office.

As to *mandamus* and *injunction:* Prescott *v.* Duquesne (duty in respect to wharf), 48 Pa. St. 118; School Directors *v.* Anderson, 45 Pa. St. 388; State *v.* Graves, 19 Md. 351; Neuse River Company *v.* Commissioners, 6 Jones (North Car.), Law, 204; State *v.* Custer, 11 Ind. 210; People *v.* Salomon, 46 Ill. 415; Same *v.* Same, 51 *ib.* 39. *Infra*, Sec. 666. *Post*, Chap. XXII. as to legal and equitable remedies.

[1] Hall *v.* Selectmen, 39 N. H. 511, and cases cited by *Bellows*, J.; Hawkins *v.* County Commissioners, 14 Ind. 521; Strong's Case, Kirby (Conn.), 345; Treat *v.* Middleton, 8 Conn. 243; Commonwealth *v.* Allegheny County, 32 Pa. St. 218, 1858; State *v.* Kirkley, 29 Md. 85, 1868; Angell & Ames, Secs. 709–712, and cases cited; St. Luke's Church *v.* Slack, 7 Cush. 226; People *v.* Supervisors, &c. 10 Wend. 363; People *v.* Supervisors, &c. 4 Seld. 317; State *v.* Cincinnati, 19 Ohio, 178; State *v.* Wood County, 17 Ohio, 184.

[2] Commonwealth *v.* Pittsburg, 34 Pa. St. 496, 509, 1859; Stephens' *Nisi Prius*, 2292.

[3] Ottawa *v.* People, 48 Ill. 233, 1868.

is a remedy in equity, or a remedy at law, if not adequate to its purpose, or because the officers or adverse party may be prosecuted criminally for neglect of duty.[1]

§ 667. The well established general rule is, as above stated, that the writ of *mandamus* will only lie to give effect to a *clear legal right;* but if there be a reasonable or fair doubt respecting the right of the public or of the relator to this form of remedy, *the writ* will be granted, and the question of the right considered on the return.[2] And however clear the legal right of the relator or applicant for the writ may be, the writ cannot be sustained if there is a clear, ample, and adequate remedy by an ordinary action at law.[3] But since the proceeding by *mandamus* has been assimilated to ordinary proceedings, the relator, if otherwise entitled, should not be denied a resort to this remedy on the ground that he can sue at law, unless it appears that this latter remedy is just as adequate and effectual as the other.

[1] Willcock, 356, pl. 40–44, and cases cited; People *v.* Mayor, 10 Wend. 393, 1833; Commonwealth *v.* Allegheny County, 32 Pa. St. 218, 1858; Stephens' *Nisi Prius,* 2306; Rex *v.* Railway Company, 2 B. & A. 646; *Ex parte* Robins, 7 Dowl. 566. *Post,* Chap. XXII.

It has been sometimes said, but perhaps without sufficient reflection, that a *remedy by injunction,* if ample, will prevent a resort to, or induce the court in its discretion to deny, a *mandamus:* State *v.* Custer, 11 Ind. 210, 212, *per Hanna,* J.; People *v.* Salomon, 46 Ill. 415. But if the suit in chancery is not of a nature to do such complete justice as a proceeding by *mandamus,* the pendency of such a suit in equity will not prevent the court from awarding a *mandamus:* People *v.* Salomon, 51 Ill. 39, 1869; Calaveras County *v.* Brockway, 30 Cal. 325. *Supra,* Sec. 664.

A statute provided that a creditor of a county should be entitled to the amount due him "in the county levy, or to a recovery thereof, with costs, by *action of debt* against the officer refusing to levy the same;" and it was held by the Court of Appeals of Virginia, that this right to an action against the officers was such a specific legal remedy as to deprive the creditor of the right to a *mandamus* to compel the levy of the tax: Justices *v.* Munday, 2 Leigh (Va.), 165, 1830; but *quære?* See Amy *v.* Supervisors, 11 Wall. 136, 1870, referred to *infra,* Sec. 691.

[2] Willc. 356, pl. 41; People *v.* Stevens, 5 Hill (N. Y.), 616; State *v.* Warren, &c. Company, 3 Vroom (N. J.), 439; Regina *v.* Heathcote, 10 Mod. 49; People *v.* Ransom, 2 Comst. (N. Y.) 490.

[3] People *v.* Supervisors, 11 N. Y. (1 Kern.) 563; People *v.* Mayor, 10 Wend. 393. It has been said that the rule in the text is "not universally true in relation to corporations and ministerial officers:" McCullough *v.*

§ 668. Thus, where the *salary or fees of an officer* of a municipal or public corporation may, like other debts, be recovered by an action at law against the corporation, this is the remedy, and not *mandamus*;[1] but if the officer cannot sue the corporation, he may, where entitled, compel payment by means of this writ,[2] unless another is in possession under color of right, in

Mayor of Brooklyn, 23 Wend. 459. And in that case, where it appeared the common council had neglected its duty in omitting to issue a warrant to collect a tax, *Bronson*, J., said, that though an action on the case would *perhaps* lie in favor of the plaintiff, who would be entitled to the money when collected, yet a *mandamus* would be a more appropriate remedy, which, according to the commentary of *Nelson*, J., is only equivalent to saying, "if the remedy by action be doubtful, a *mandamus* will lie:" 11 N. Y. (1 Kern.) p. 573, 574. See, also, People *v.* Supervisors, &c. 10 Wend. 363, 366, where it is said, "If an action lies in this case, then a *mandamus* should be refused:" People *v.* Brooklyn, 1 Wend. 318, 325; Boyce *v.* Russell, 2 Cow. 444; People *v.* Mayor of New York, 25 Wend. 680; People *v.* Stevens, 5 Hill, 616.

That mandamus will not lie where there is an adequate remedy by statute or by an ordinary action at law: Commissioners, &c. *v.* Lynch, 2 McCord (South Car.), 170, 1822; Crandall *v.* Amador, 20 Cal. 72; Johnson County *v.* Hicks, 2 Ind. (Carter) 527, 1851; Township Trustees *v.* State, 11 Ind. 205, 1858; Baker *v.* Johnson, 41 Maine, 15, 1856; People *v.* Edmunds, 15 Barb. 529; 19 Barb. 468; State *v.* McCrillus, 4 Kansas, 250; Railroad Company *v.* State, 25 Ind. 177; Justices *v.* Munday, 2 Leigh (Va.), 165; People *v.* Supervisors, 11 N. Y. 563. So under the English common law procedure, act of 1864, Sec. 68, *mandamus* will not be sustained if there be any other remedy equally adequate and effective: Bush *v.* Beavan, 1 Hurl. & Colt. 500.

Mandamus will not lie where a party has an appeal or the right to a writ of error, which will give adequate relief: *Ex parte* Nelson, 1 Cow. 417; State *v.* Mitchell, 2 Const. Rep. (South Car.) 703, 1815; Williams *v.* County Judge, 27 Mo. 225; Rex *v.* Benchers of Gray's Inn, Douglas, 339. *Post*, Chap. XXII.

Where the writ of *certiorari* was taken away, the court refused to indirectly interfere to bring the proceedings under review by *mandamus:* Rex *v.* Yorkshire, &c. 1 A. & E. 563. *Post*, Chap. XXII.

[1] People *v.* Thompson, 25 Barb. 73; *Ex parte*, Lynch, 2 Hill (N. Y.), 45, 1841; People *v.* Mayor, &c. of New York, 25 Wend. 680; Boyce *v.* Russell, 2 Cow. 444, 1824. *Ante*, p. 202. Reynolds *v.* Taylor, 43 Ala. 420, 1869.

[2] Baker *v.* Johnson, 41 Maine, 15, 1856; People *v.* Edmonds, 15 Barb. 529; Commonwealth *v.* Johnson, 2 Binney (Pa.), 275; People *v.* Supervisors, 32 N. Y. 473. But it will not lie to control a discretion as to the amount to be allowed: People *v.* Supervisors, 1 Hill, 362; People *v.* Mayor, &c. 25 Wend. 680, 686; People *v.* Mayor, &c. 9 Wend. 508. Compensation of municipal officers: *Ante*, p. 202. In North Carolina, while it is conceded that the court "will not, ordinarily, at least, interfere by *mandamus* where there is another specific legal remedy" (State *v.* Jones, 1 Ire. 134), yet it is doubted

which case the title to the office cannot ordinarily be determined on *mandamus*, or in any collateral proceeding.[1] So in a case in which it appeared that the state of New York had issued bills of credit to the amount of £200,000, which sum was apportioned among the several counties of the state and paid over to each county to be loaned out to its citizens on mortgage security; and where it was provided by statute that if any deficiency on foreclosure should exist, the *supervisors* should raise the same as the ordinary county charges are levied and collected, it was decided that the remedy of the state, where the supervisors omitted to perform this duty, was by *mandamus* against them, and not by *action* against the county, as the county was only liable in the way pointed out by the statute.[2]

whether, when the legislature authorizes one set of public officers—as, for example, a school committee—to make contracts, and directs that the employees shall be paid by another public officer, upon an order from the first, there can be any other specific legal remedy than that afforded by *mandamus: Per Battle*, J., in Taylor *v.* School Commissioners, 5 Jones (Law), 98, 1857.

[1] Winston *v.* Mosely, 35 Mo. 146, 1864; State *v.* State Auditor, 34 *ib.* 375; followed, State *v.* Auditor, 36 Mo. 70; People *v.* Brennan, 45 Barb. 457. *Infra*, Sec. 680, *et seq.*; *Post*, Chaps. XXI., XXII.

[2] People *v.* Supervisors, 10 Wend. 363, 1833; People *v.* Supervisors, 16 Johns. 59, 1819.

The doctrines of the text, as to *mandamus*, may be illustrated by a brief reference to some of the adjudged cases, in which the writ has been held to be the proper remedy to compel the performance of a public duty. Thus, *mandamus* lies to compel public officers, on the *division of towns*, to apportion the money between them pursuant to the directions of the statute: People *v.* Marsh, 2 Cow. 485, 1824. *Ante*, p. 78, Sec. 34; p. 80, Sec. 36; p. 81, Sec. 37; p. 88, Sec. 43; p. 168, Secs. 127–129.

To pay for authorized *public improvements* within a municipality, the legislature may direct the local officers to *issue its bonds*, and upon their refusal to issue them, the duty may be compelled by *mandamus:* People *ex rel.* McLean *v.* Flagg, 11 Am. Law Reg. 80, decided by the New York Court of Appeals. *Ante*, p. 90; *ante*, Chap. XIX. People *v.* White, 54 Barb. 622, 1869.

Mandamus will lie to compel a city to make *an assessment*, directed by an act of the legislature, to pay for buildings pulled down to open a public street, or to make and collect street assessments: Shoolbred *v.* Charleston, 2 Bay (South Car.), 63, 1796; Himmelman *v.* Coffran, 36 Cal. 411; Wilson *v.* Berksteesser, 45 Mo. 283, 1870; State *v.* Keokuk, 9 Iowa, 438; Chapin *v.* Osborn, 29 Ind. 99; Rex *v.* Canal Company, 1 M. & S. 32; Regina *v.* Canal

Mandatory and Discretionary Powers.

§ 669. Powers conferred upon municipal corporations are, as we have heretofore seen, of two general classes—the one

Company, 8 Dowl. P. C. 623. So the writ will lie to a city council to *compel prosecution of a local improvement* commanded by statute to be made: People *v.* Common Council of Brooklyn, 22 Barb. 404. So, also, to compel, *commissioners of the poor* to discharge duties imposed on them, if there be no adequate remedy at law: Commissioners, &c. *v.* Lynah, 2 McCord (South Car.), 170, 1822; State *v.* Mitchell, 2 Const. (South Car.) 703; Rex *v.* Bank of England, Douglas, 506. *Post*, Sec. 743.

As the writ lies to enforce public rights, it will be granted to compel the *mayor* to perform his duty as a *presiding officer* after default in that respect: Rex *v.* Everett, Cas. Temp. Hardw. 261; Rex *v.* Williams, 2 M. & S. 141; Willc. 357, pl. 46. *Ante*, pp. 186, 187, 240, 241. And to compel the proper officer of the city *to issue a license* to one entitled thereto: East St. Louis *v.* Wider, 46 Ill. 351. See Hall *v.* Supervisors, 20 Cal. 591.

Mandamus will lie to compel county commissioners to *make a record of their action* in a matter affecting individual rights, so that an appeal may be taken if desired: Commissioners of Warren County *v.* State, 15 Ind. 250. And against an officer, to compel him to *record a deed or paper:* Strong's Case, Kirby (Conn.), 345; People *v.* Collins, 7 Johns. 549, 1811; *Ex parte* Goodell, 14 Johns. 325, 1817. And against commissioners of a county, to compel them to *receive and file a petition* for a change of the boundaries of the county, as required by law: Hawkins *v.* County Commissioners, 14 Ind. 521. So it will lie to compel the officer having custody of the *corporate seal*, to affix it to any document to which it is the duty of such officer to put it: Tapping on *Mandamus*, 96; 3 Blackst. Com. 110.

Where a statute *is mandatory*, enjoining upon the mayor and aldermen the performance of a duty, such as to appoint commissioners to *discharge a public duty* connected with the navigation of a public stream, *mandamus* will lie: Mayor, &c. *v.* State, 4 Geo. 26, 1848. In Georgia, a city marshal may be compelled, by *mandamus*, to perform his official duty to *restore property levied on for taxes* to the claimant on receiving the bond and security required by statute: Mitchell *v.* Hay, 37 Geo. 581, 1868. A *mandamus* is the proper remedy for the state to compel an officer—*e. g.* a county auditor—to perform a public duty, in which the state is interested, *e. g. to issue his tax duplicate* without adding an *illegal* per cent: Hamilton *v.* State, 3 Ind. (Port.) 452, 1852.

County—Duty as respects paupers: Where a statute provided that when any person, not a pauper, "shall fall sick and die in any county in this state, not having money to pay his board, medical aid, or burial expenses, it shall be the duty of the County Court to make such allowances therefor as shall seem just," it was held that this extended to persons of this class within the limits of an incorporated place, the corporation charter being silent on the subject; and that the county could be compelled, by *mandamus*, to make a proper allowance when such expenses have been incurred: Gunn *v.* County, 3 Ark. 427, 1840.

mandatory, the other discretionary.[1] Discretionary powers are not, unless in extraordinary and exceptional instances, to restrain gross abuse, subject to judicial control;[2] but duties imperatively enjoined may, as we have just shown, be enforced by *mandamus*.

The general rule of law is this: If the inferior tribunal, corporate body, or public agent or officer has a *discretion, and acts and exercises it*, this discretion cannot be controlled by *mandamus*. But if the inferior tribunal, body, officer, or agent *refuse to act* in cases where the law requires them to act, and the party has no other legal remedy, and where, in justice, there ought to be one, a *mandamus* will lie to set them in motion, to compel action; and, in proper cases, the court will settle the legal principles which should govern, but without controlling the discretion of the subordinate jurisdiction, body, or officer.[3]

[1] *Ante*, Chap. V. p. 110, Sec. 62; Commonwealth *v.* Pittsburg, 34 Pa. St. 496, 516, *per Strong*, J.; County Commissioners *v.* Duckett, 20 Md. 468; *ib.* 449; Rex *v.* Hastings, 1 D. & R. 148; Baltimore *v.* Marriott, 9 Md. 160; Meyer *v.* Carolan, 9 Texas, 250; Regina *v.* Dock Company, 2 Eng. Railway Cases, 599; Sights *v.* Yarnalls, 12 Gratt. (Va.) 292; Goodrich *v.* Chicago, 20 Ill. 445; Railroad Company *v.* Napa County, 30 Cal. 435; Ottawa *v.* People, 48 Ill. 233, 1868; People *v.* Brooklyn, 22 Barb. 404; Supervisors *v.* United States, 4 Wall. 435, 444, 1866, where Mr. Justice *Swayne* distinguishes the two classes of powers; Rex *v.* Bailiffs, &c. of Eye, 2 D. & R. 172, construing the words "shall be lawful."

[2] *Ante*, Chap. V. p. 106, Sec. 58; *post*, Chaps. XXII. XXIII.

[3] Giles's Case, 2 Stra. 881; Rex *v.* Nottingham, Sayer, 217; Hull *v.* Supervisors, 19 Johns. 259, 1821; Gourley *v.* Allen, 5 Cow. 644; People *v.* Supervisors, 12 Johns. 414; *Ex parte* Nelson, 1 Cow. 417; *Ex parte* Bailey, 2 Cow. 479; Elkins *v.* Athearn, 2 Denio, 191; People *v.* Supervisors, 1 Hill (N. Y.), 50; *ib.* 362; *Ex parte* Turner, 5 Ohio, 542, 543, *per Lane*, J.; McKean *v.* Louisville, 18 B. Mon. 9; Commonwealth *v.* Henry, 49 Pa. St. 530; Kennedy *v.* Washington, 3 Cranch, C. C. 595; State *v.* Robinson, 1 Kansas, 188, 220; Magee *v.* Supervisors, 10 Cal. 376; State *v.* Wilmington City Council, 3 Harring. (Del.) 294.

The principle in the text is well illustrated by the case of The King *v.* Bristol Dock Company, 6 B. & C. 181, in which the dock company was authorized by parliament to make a floating harbor in the city, and *required* "to make such alterations and amendments in the sewers of said city as might or should be necessary in consequence of the floating of said harbor," and it was decided that the directors might by *mandamus* be commanded, in the words of the act, "to make such alterations," &c., but the nature of the alterations could not be specified, as this was a matter committed by

§ 670. Thus a *mandamus* will be issued by the proper federal court to an officer of the federal government, commanding him to do a mere *ministerial act*, but not one which involves the exercise of judgment and discretion.[1]

§ 671. So where there is a duty, *purely ministerial, and not discretionary*, devolved by law upon the public officers of a state, and the refusal or neglect to perform the duty affects a specific legal right, the person thereby injured may have a *mandamus*. This doctrine, under the conditions just stated, has been very generally considered to be applicable to the *executive head* of the state; but it should obviously be limited to cases where the right of the relator is plain and the duty of the executive clearly ministerial, and not discretionary. The leading cases on this subject are referred to in the note.[2]

parliament to the judgment and discretion of the directors of the company.

Mandamus held not to lie to enforce the award of a contract to the *lowest bidder:* State *v.* Board of Education, 24 Wis. 683; State *v.* Commissioners, 18 Ohio St. 386; Welch *v.* Supervisors, 23 Iowa, 199; People *v.* Contracting Board, 27 N. Y. 378; 46 Barb. 254; 33 N. Y. 382; Commonwealth *v.* Henry, 49 Pa. St. 530; People *v.* Brennan, 39 Barb. 651. As to rights of *lowest bidder: Ante,* Chap. XIV. Secs. 388–392.

[1] Kendall *v.* United States, 12 Pet. 524; Decatur *v.* Paulding, Secretary of Navy (to compel defendant to pay pension), 14 Pet. 497, 1840; Reeside *v.* Walker, Secretary of Treasury, 11 How. 272; United States *v.* Guthrie, Secretary of Treasury, 17 *ib.* 284; Same *v.* Seaman, *ib.* 225; Brashear *v.* Mason, 6 How. 97; United States *v.* Land Commissioner, 5 Wall. 563; *Ex parte* De Groot, 6 Wall. 497; The Secretary *v.* McGarrahan, 9 Wall. 298, 312, 1869.

A state court cannot issue a *mandamus* to an officer of the United States: McClung *v.* Silliman, 6 Wheat. 598.

[2] When the act neglected to be done by the governor of a state is purely ministerial, not discretionary, and affects a specific private right, a *mandamus* may issue: State *v.* Governor of Ohio, 5 Ohio St. 528, 1856. Thus *the governor* will, by *mandamus*, be compelled, in a proper case, to issue commission to an officer presenting legal evidence of his election: State *ex rel.* Loomis *v.* Moffitt, 5 Ohio, 358, 362, *per Hitchcock,* J.; State *v.* Governor of Ohio, 5 Ohio St. 528, 1856. *Contra:* Hawkins *v.* Governor, 1 Pike (Ark.), 570, 1839; State *v.* Governor, 1 Dutch. (N. J.) 331, 1856, in which the right to issue a *mandamus* to the governor, in any case, is denied; People *v.* Bissell, 19 Ill. 229. But it has been elsewhere held that the governor or executive officers of a state may, by means of this writ, be compelled to perform mere ministerial duty or act in which individuals have an interest: Low

§ 672. On the principle that *official discretion* cannot be judicially interfered with by *mandamus*, this writ will not lie to control the discretion of commissioners to determine the site for a *county seat*, they having been directed to locate it as near the center of the county as a suitable location could be obtained, and having made a selection, although it was admitted that it would be granted to compel them to act.[1] So where the statute vests the county commissioners with the power to determine *when a court house and jail* shall be erected by the county, *mandamus* will not lie to compel them to erect those buildings, or, if the contract has been let, to proceed with the erection thereof.[2]

§ 673. So, where the *building of bridges is a discretionary power* entrusted to public or municipal corporations, and the proper authorities thereof have, in good faith, decided according to their judgment, *mandamus* will not be issued to compel them to a different course.[3] But a provision in a municipal

v. Towns, 8 Geo. 360, 1850; Middletown *v.* Lowe, 30 Cal. 596; Magruder *v.* Swann, 25 Md. 173; Cotten *v.* Ellis, 8 Jones (North Car.), Law, 545; State *v.* Wrotnowski, 17 La. An. 156; Biddle *v.* Willard, 10 Ind. 62, 1857; Bryan *v.* Cattell, 15 Iowa, 538; Nichols *v.* Comptroller, 4 Stew. & Port. (Ala.) 154, 1833; Pacific Railroad Company *v.* Governor, 23 Mo. 353; Chamberlain *v.* Sibley, 4 Minn. 309. In Maurin *v.* Smith, 5 Am. Law Reg. (N. S.) 630, and S. C. 8 Rh. Is. 192, *mandamus* was held not to lie to compel the governor to perform one of his statutory duties as commander-in-chief. *Mandamus* lies against the *auditor of state* or comptroller of public accounts where the right of the plaintiff is clear and no other remedy is provided, and the duty is not discretionary: Divine *v.* Harris, 8 Mon. (Ky.) 440; Nichols *v.* Comptroller, 4 Stew. & Port. (Ala.) 154, 1833; Fowler *v.* Pierce, 2 Cal. 165; Towle *v.* State, 3 Fla. 202.

[1] State *v.* Bonner, Busbee (North Car.), Law, 257, 1853. As to county seat elections, and the remedy for frauds therein, by *mandamus* and in equity, see People *v.* Wiant, 48 Ill. 263, 1868; see, also, People *v.* Salomon, 51 Ill. 39.

[2] *Ex parte* Black, 1 Ohio St. 30, 1852.

[3] State *v.* Freeholders, 3 Zabr. (N. J.) 214, 1851. *Post*, Chap. XXIII.

The judgment and discretion of the town supervisors as to the necessity of *bridges* and repairs thereon cannot be controlled by *mandamus* when the statute makes *them* the judges of the necessity: State *v.* Supervisors, 16 Wis. 613. But the duty to *repair and rebuild bridges* may, when it is not discretionary, be enforced by *mandamus:* Howe *v.* Crawford County, 47 Pa. St. 361; Treat *v.* Middleton, 8 Conn. 243; Brander *v.* Judges, &c. 5 Call (Va),

charter that the council shall "cause the *streets to be kept in repair*" has been held not to confer a discretionary power, but to enjoin a duty, the performance of which may be compelled by *mandamus*.[1] The performance of this duty is sometimes enforced by indictment, and often by private action for damages.[2]

§ 674. *Mandamus as repects Municipal Elections and Officers.* —In a previous chapter the powers of municipal corporations as to *elections and officers therein* have been considered;[3] and it may be here stated as a general proposition that *mandamus* is ordinarily the appropriate remedy to compel them and their officers, in case of refusal or neglect, to perform their duties in these respects.[4] In England the writ lies, and is constantly issued, to compel the corporation to elect a mayor and other corporate officers according to their duty;[5] but if the office is

548; Ottawa *v.* People, 48 Ill. 233; People *v.* Supervisors, 1 Hill (N. Y.), 50. County Commissioners were, by statute, "*authorized*" annually, at their June session, to levy a tax "for the construction and maintenance of a free turnpike road through their county:" held, that it "authorized," but did not require, the levy of the tax, and no private rights having intervened, a *mandamus* to levy the tax was refused: Commissioners *v.* Sandusky County, 1 Ohio St. 149, approving and distinguishing Mayor *v.* Furze, 3 Hill (N. Y.), 612. In England it has been held that *mandamus* will not be issued to determine which of two parishes is liable to repair a road, under local acts: Regina *v.* Turnpike Roads, 12 A. & E. 427. See Rex *v.* Commissioners of Roads, 2 Term R. 232.

[1] Hammar *v.* Covington, 3 Met. (Ky.), 494, 1861; Uniontown *v.* Commonwealth, 34 Pa. St. 293, 1859. *Ante*, chapter on Streets, Sec. 579, note.

[2] See, *post*, Chap. XXII.; also, Chap. XXIII. as to liability for defective streets. *Post*, Secs. 747, 748.

[3] *Ante*, Chap. IX. on Municipal Elections and Officers, p. 174, *et seq.*

[4] *Ib.* Lamb *v.* Lynd, 44 Pa. St. 624; S. C. Brightley's Election Cases, 624–631, and note of the learned editor.

[5] Rex *v.* Cambridge, 4 Burr. 2008; Rex *v.* Tregony, 8 Mod. 113; Rex *v.* Abingdon, 1 Ld. Raym. 561; Rex *v.* St. Martin, 1 Term R. 149; Rex *v.* Liverpool, 1 Barnard. 83; Rex *v.* Woodrow, 2 Term R. 732; Rex *v.* Scarborough, 2 Stra. 1180; Rex *v.* Leyland, 3 M. & S. 184; Rex *v.* Thetford, 8 East, 270; Rex *v.* Norwich, 1 B. & Ad. 310; Willc. 357, pl. 45; *ib.* 361, pl. 56; Tapping on *Mandamus*, 165; Rex *v.* York, 4 T. R. 699; Stephens' *Nisi Prius*, 2293–2295; Rex *v.* Winchester, 7 A. & E. 215; Regina *v.* Pembroke (corporation of), 8 Dowl. P. C. 302; Regina *v.* Leeds (mayor of, &c.), 7 A. & E. 963; Grant on Corp. 204, 208, 213, 219.

full by the possession of an officer *de facto* under color of right, a *mandamus* will not, as hereafter explained, be granted to proceed to a new election until the person in possession has been ousted upon proceedings in *quo warranto*.[1] "The court," says Mr. *Willcock*,[2] "will grant a *mandamus* to proceed to an election of a new mayor, *after the charter day has passed* without such election, where the former mayor having the power to do so holds over, and refuses to convoke an assembly[3] for that purpose, unless the charter restrains the right of electing to a particular time;" and "it will be granted for the election of bailiffs, chamberlains, coroners, and other annual officers, although not the chief officers of the corporation."

§ 675. So, in this country it has been decided that an *election for municipal officers may be held after the charter day*, and that a *mandamus* may be granted to compel the proper officers to give notice thereof.[4] And the writ will lie in the name of the state on the relation of a voter to compel a municipal council to hold or appoint a *special election*, according to the charter, to fill a vacancy in their body, when this is a duty enjoined upon them; and to justify the writ there need not be a positive refusal, unreasonable delay manifesting an intention not to perform the duty, is sufficient.[5] So where it is made by

[1] Rex *v.* Bankes, 3 Burr. 1454; Rex *v.* Cambridge, 4 *ib.* 2011; Rex *v.* Radford, 1 East, 80; Rex *v.* Truro, 3 B. & A. 592; Rex *v.* Derby, 7 A. & E. 419; Rex *v.* Hiorns, *ib.* 960; *ib.* 966; Rex *v.* Colchester, 2 Term R. 259. *Infra*, Secs. 678–682. *Post*, Sec. 716.

[2] Willc. 357, pl. 45; *ib.* 361, pl. 56; Rex *v.* Cambridge, 4 Burr. 2011; Rex *v.* Scarborough, 2 Stra. 1180; Rex *v.* Norwich, 1 B. & Ad. 310; Angell & Ames. Sec. 700.

[3] As to Corporate Assembly, see *ante*, Chap. X.

If municipal corporations neglect to hold elections as empowered by the remedial statute of 11 Geo. I. Chap. IV. by which they are authorized to supply the vacant offices of mayor, they may be compelled to fill them by *mandamus;* Rex *v.* Oxford, Cas. Temp. Hardw. 178; Rex *v.* Cambridge, 4 Burr. 2011; Willc. 360.

As to right of *officers to hold over*, see authorities last cited, and also, *ante*, Chap. IX. pp. 193–197.

[4] People *v.* Fairbury, 51 Ill. 149, 1869. *Ante*, pp. 193–197; Tapping on *Mandamus*, 165. *Post*, Sec. 722.

[5] State *v.* Rahway, 33 N. J. Law, 110, 1868. Vacancies in municipal offices: *Ante*, p. 197, Sec. 161.

charter the duty of the select and common councils to assemble in *joint meeting* to appoint certain corporate officers, not elected by the people, and the time for the meeting is fixed by law or ordinance, it is not discretionary in one of these bodies to refuse to meet with the other, and if it does so refuse, its members may be compelled by *mandamus*.[1]

§ 676. *Municipal councils*, as we have before seen, are often invested with the control of municipal elections, and are *made canvassers and judges of the result*, and they may be compelled to perform their duties in this respect by *mandamus*.[2]

[1] Lamb & Lynd, 44 Pa. St. 336, 1863. S. C. Brightley's Election Cases, 624, and note. *Read*, J., concurred because this was a necessary result of Kerr *v.* Trego, 47 Pa. St. 632; S. C. Brightley's Election Cases 632, where he dissented. *Ante*, Chap. X. p. 248, Sec. 222. Further, as to *contested election cases:* Brightley's Election Cases, 270, 455, 466, 656. *Post*, Chap. XXI. on *Quo Warranto*.

[2] *Ante*, Chap. IX. pp. 179–183; Lamb *v.* Lynd, Brightley's Election Cases, 624, 630, and note. S. C. 44 Pa. St. 336.

Mandamus will lie to compel *election canvassers*, whose duties are ministerial, to act, but not to control their judgment: Magee *v.* Supervisors, 10 Cal. 376; State *v.* County Judge, 7 Iowa, 186; Rice *v.* Smith, 9 Iowa, 570; State *v.* Bailey, 7 Iowa, 390. *Ante*, p. 182, note. Moses on *Mandamus*, Chap. XIII.; Brightley's Election Cases, 261, 300, 305, 423, 434.

It will also lie, upon the relation of any voter or tax payer interested, to compel an election officer *to announce the result* of an election: People *v.* Salomon, 46 Ill. 415. So it will lie to a returning officer, board of examiners, or managers of an election, or council, to compel them to *give a certificate of election* to the person elected: State *v.* The Judge, &c. 13 Ala. 805, 1848; Strong, Petitioner, 20 Pick. 484, 1838; O'Ferrall *v.* Colby, 2 Minn. 180; State *v.* Loomis, 5 Ham. (Ohio) 358, 362; Rex *v.* York, 4 Term R. 669. Such certificates are important since they are *prima facie* evidence of title, though not conclusive in the trial of contested elections: Kerr *v.* Trego, 47 Pa. St. 292, 1864; S. C. Brightley's Election Cases, 632, 641, and note; Carpenter *v.* Ely, 4 Wis. 420; Brightley's Election Cases, 258, 314, 320, 435. So *mandamus* lies to a municipal corporation to compel it to act according to its duty upon the *sufficiency of sureties* offered by a person elected to a municipal office. *Ante*, p. 192, note. *Mandamus* lies in favor of relators duly elected to a municipal office to compel the mayor or proper officer to administer *the oath of office* to them: *Ex parte* Heath, 3 Hill (N. Y.), 42, 1842.

To Take Municipal Office.

§ 677. In England, on the principle heretofore adverted to,[1] if a corporator, elected to a corporate office, neglect or refuse, without sufficient legal excuse, *to serve*, he may be compelled by *mandamus*, but it is doubtful, as before suggested, how far this doctrine is applicable in this country.[2]

To Admit to Municipal Office.

§ 678. In appropriate cases, *mandamus* will lie to compel the proper officers of a municipal corporation to *admit to the possession* of his place one elected to any municipal or corporate office.[3] *Mandamus* is not considered, in England, the proper remedy to try the right to a public or municipal office, and a *mandamus* to admit gives no title to the person admitted, but it enables him to try or enforce his right; and if there is another remedy open to the applicant, as, for instance, an information in the nature of *quo warranto* (which lies where the adverse claimant or officer is in possession), a *mandamus* will not be granted. But it will be granted, says Mr. *Willcock*, "where *quo warranto* does not lie, although the office be already full, as otherwise in many cases the applicant would be without remedy."[4] In cases where *mandamus* lies, the applicant will be refused the writ unless he shows a *prima facie* title.[5]

§ 679. In this country the same general principles are recognized, although there is, as we shall see, some difference of opinion as to the scope of the remedy by *mandamus* where

[1] *Ante*, p. 198, Sec. 162; Rex *v.* Bedford, 1 East, 80; Rex *v.* Leyland, 3 M. & S. 184; Willc. 367. When the writ lies to compel an officer to take upon himself the duties of his office: *Ante*, p. 198, Sec. 162; Tapping on *Mandamus*, 189.

[2] *Ante*, p. 198, Sec. 162; p. 201, Sec. 165.

[3] State *v.* Rahway, 33 N. J. (Law) 111, 1868; Willc. 368 pl. 74; Angell & Ames on Corp. Sec. 703.

[4] Regina *v.* Leeds, 11 A. & E. 512; Rex *v.* Winchester, 7 A. & E. 215; Rex *v.* Sawyer, 10 B. & C. 486; Regina *v.* Slatter, 11 A. & E. 505; Regina *v.* Derby (councillors of), 7 A. & E. 419; Same *v.* Hiorns, *ib.* 960; Frost *v.* Chester, 5 E. & B. 531; Willc. 373, pl. 87. The *requisites of returns* to writs of *mandamus to admit* are stated by Mr. *Willcock*, at pp. 413–417, and by Angell & Ames, Sec. 722.

[5] Willc. 368, pl. 74.

there is an officer or adverse claimant in possession. Thus *mandamus* lies to compel the city council *to admit a councilman* duly elected to that office.[1] But on the ground that *mandamus* was not a proper proceeding to try the right to a public office, the court declined to make an order to show cause, in a case where the relator claimed to have been elected by the common council to the office of assessor, and also claimed that the council wrongfully deprived him of his office by refusing to count the vote of one of the members in his favor.[2]

§ 680. The adjudged cases in this country agree that *quo warranto*, or an information or proceeding in the nature of a *quo warranto*, is the appropriate remedy, when not changed by charter or statute, for an *usurpation of a municipal franchise*, as well as for unauthorized usurpations and *intrusions into municipal offices*.[3] When no special tribunal, with exclusive and final power to settle contested titles to office, is provided, the regular method is by *quo warranto;*[4] and the instances are exceptional when this may be done on *mandamus*. If another is commissioned, and in actual discharge of the duties of the office, an adverse claimant to the office is not entitled to a *mandamus*, but must resort to *quo warranto;* but it was admit-

[1] State *v.* Rahway, 33 N. J. (Law) 111, 1868.

[2] People *v.* Detroit, 18 Mich. 338, 1869.

[3] Reynolds *v.* Baldwin, 1 La. An. 165; followed, Cochran *v.* McCleary, 22 Iowa, 75, 1867; State *v.* Ramos, 10 La. An. 420; People *v.* Matteson, 17 Ill. 167; People *v.* Stevens, 5 Hill (N. Y.), 616, 1843; Hullman *v.* Honocomp, 5 Ohio St. 237, 1855. *Ante*, p. 241, Sec. 210. *Post*, Secs. 714—716.

Legality of election and title to office cannot [ordinarily] be tested by *bill in chancery: Ib.* But see in exceptional instances: Kerr *v.* Trego, 47 Pa. St. 292, 1864; cited *ante*, p. 243, Sec. 213; S. C. Brightley's Election Cases, 632. Remedy by *injunction:* Brightley's Election Cases, 573, 623, and cases cited.

The title to office must be tested on *quo warranto*, and cannot be questioned collaterally: People *v.* Fletcher, 2 Scam. (Ill.) 487; Bonner *v.* State 7 Geo. 473, 1849, and cases cited; People *v.* Kip, 4 Cow. 382, note; *Ib.* 358, 1822; Lewis *v.* Oliver, 4 Abb. Pr. Rep. 121; St. Louis County Court *v.* Sparks, 10 Mo. 117, 1846; Winston *v.* Moseley, 35 Mo. 146. *Ante*, Chap. IX. p. 179, *et seq.; ante*, Chap. X.; *post*, Chap. XXI. In Pennsylvania, *quo warranto* lies to try the right to all offices, military as well as civil: Commonwealth *v.* Small, 27 Pa. St. 31; Field *v.* Commonwealth, 32 Pa. St. 478.

[4] *Ante*, Chap. IX. pp. 179–183; People *v.* Detroit, 18 Mich. 338.

ted that where the office is attempted to be held under an appointment which is merely colorable and void, *mandamus* would lie.[1] In Texas it is held that *mandamus* will lie to recover or to be admitted to the possession of an office to which the claimant has been elected and commissioned.[2] In Georgia, and some of the other states, the English rule is maintained, namely, that where a person is an officer *de facto* —that is, is in the exercise of the duties of an office under a *prima facie* right or color of title—the remedy to admit another having a lawful claim is not by *mandamus*, but by an information in the nature of a *quo warranto*.[3]

§ 681. But, in a case in Maryland,[4] in which the claimant sought not only the removal of the incumbent, but the possession of the office for himself, the objection was made that *quo warranto*, and not *mandamus*, was the proper remedy to try the title to the office; but the Court of Appeals held that the objection was not well taken, and that the plaintiff need not resort to *quo warranto* as preliminary to *mandamus*, as this might prove inadequate, by reason of the delay it would occasion. The court was of opinion that *mandamus* to compel the defendant to surrender to the petitioner the office was the only com-

[1] State *v.* Dunn, Minor (Ala.), 46, 1821; State *v.* Auditor, 36 Mo. 70, 1865, *per Wagner*, J.; People *v.* Scrugham, 20 Barb. 302. *Post*, Sec. 716.

[2] Lindsley *v.* Luckett, 20 Texas, 516.

[3] Bonner *v.* State, 7 Geo. 473, 1849; State *v.* Deliesseline, 1 McCord (South Car.), 52; State *v.* Dunn, 1 Minor (Ala.), 46; People *v.* Corporation of New York, 3 Johns. Cas. 79; Rex *v.* Mayor of Colchester, 2 Term R. 259; S. P. St. Louis County Court *v.* Sparks, 10 Mo. 117, 1846. "*Mandamus* will not be issued to admit a person to an office while another is under color of right:" State *v.* Auditor, 36 Mo. 70, *per Wagner*, J. *Mandamus* will not lie to turn out one officer and to admit another in his place: People *v.* Matteson, 17 Ill. 167; People *v.* Head, 25 Ill. 325; People *v.* Hilliard, 29 Ill. 413, 1862. But a groundless, colorless claim to an office, or a pretended intrusion into or retention of it, will not, as against a person duly elected and acting, be sufficient to drive the informant to a *quo warranto*, and he may have a *mandamus* to compel such person, though he was the informant's predecessor in office, to deliver up the books and property belonging to the office: People *v.* Kilduff, 15 Ill. 492, 1854; Rex *v.* Cambridge, 4 Burr. 2008; Borough of Tintagel (case of) 2 Stra. 1003; Rex *v.* Winchester, 7 A. & E. 215. When *mandamus* is *the proper* remedy to determine the right to an office: Grant on Corp. 216. *Post*, Secs. 715, 716.

[4] Harwood *v.* Marshall, 9 Md. 83, 1856.

plete remedy, since "under the *quo warranto* information the judgment might amove the occupant, but would not install the claimant."[1] And the court further held that *mandamus* might issue although the office was filled by the defendant, who claimed title. It admitted the conflict of decision on this point, but regarded *mandamus* as particularly applicable to the cause before the court.

§ 682. There is much to recommend the views of the Maryland court in the case just referred to, since the delays of resorting to *quo warranto* are such, in consequence of the short terms of our elective officers, as generally to amount to a denial of justice. Before the *quo warranto* proceedings can be determined, the term of the claimant frequently expires, and a judgment in his favor is a barren victory.[2] It is agreed that where, for any reason, *quo warranto* will not lie, and there is no other adequate remedy provided, the right to a disputed office may be settled on *mandamus*.[3] Looking at the question in view of our short official terms, we should say that where the effect of compelling a resort to *quo warranto* would be unreasonably to delay the decision of the disputed right (which concerns not only the individuals, but the public), the court would be justified in interfering by *mandamus*, so far, at least, as to see that the incumbent is actually a *bona fide* possessor of the place, and that there is a real dispute and fair doubt as to which party has the legal title.[4]

[1] *Ib.*; citing Strong's Case, 20 Pick. 497; Dew's Case, 3 Hen. & Munf. (Va.) 1, 23. See, also, in Massachusetts, Howard *v.* Gage, 6 Mass. 462.

[2] Where a judgment of ouster in *quo warranto* has been rendered in an inferior court and the defendant has duly appealed and filed the necessary *supersedeas* bond, *mandamus* from the superior court to the inferior court to execute the judgment of ouster will not be awarded, although the term of office will expire before the appeal can be regularly heard in the appellate tribunal: United States *v.* Addison, 22 How. (U. S.) 174, 1859. If the appellant fails to prosecute his appeal with effect, it is intimated by Mr. Justice *McLean* that the *supersedeas* bond would be available in such a case to the appellee or defendant in error as an indemnity: *Ib.* p. 185. *Infra*, Sec. 712.

[3] Willc. 373, pl. 87; People *v.* Stevens, 5 Hill (N. Y.), 616, 1843.

[4] *Post*, Chap. XXI. When conflicting claims to office may be settled on *mandamus*, discussed, but not determined, in the People *v.* Stevens, 5 Hill (N. Y.), 616, 1843; People *v.* Scrugham, 20 Barb. 302; People *v.* Kilduff, 15

To Restore to Municipal Office.

§ 683. The power of municipal corporations *to amove officers* has been treated in a former chapter;[1] and the corporation, as we have seen, may, in some cases, be compelled by *mandamus* to exercise this power.[2] Where a municipal officer or member of a municipal council has been illegally suspended or illegally removed, he is, in general, entitled to a *mandamus to be restored.*[3] The doctrine has been sanctioned, that where an officer of a corporation has been *irregularly* removed, yet if the court see good cause for the removal, that is, if they see that by regular proceedings another amotion for the same cause would follow, and that it is the *duty* of the corporation

Ill. 492; Banton *v.* Wilson, 4 Texas, 400; Lindsly *v.* Luckett, 20 Texas, 516; Angell & Ames, Sec. 706. In *Ex parte* Heath, 3 Hill (N. Y.), 42, the question whether the relators were duly elected to municipal offices was incidentally determined on *mandamus*, but the question as to the "proper remedy was not made:" 5 Hill, 629, *per Bronson*, J. But where *mandamus* is resorted to in order to try which of two persons has been elected to an office, and indeed in every such proceeding except *quo warranto*, the regular determination of the board of canvassers is conclusive: People *v.* Stevens, 5 Hill (N. Y.), 616, where court refused application of relator to compel, by *mandamus*, predecessor in office to deliver books and papers, because relator's title to the office was not clear; People *v.* Vail, 20 Wend. 12, 14. *Post*, Sec. 716.

If there be doubt as to the validity of an election, the court will not interfere by *mandamus* in the first instance, but will leave the parties to their remedy by *quo warranto:* Commonwealth *v.* Commissioners, 5 Rawle (Pa.), 75.

[1] *Ante*, Chap. IX. p. 211–229; Willc. 375; Grant on Corp. 243, 416.

[2] *Ante*, p. 223, Sec. 189, note.

[3] *Ante*, p. 221, Sec. 186, note; p. 228, Sec. 193; Duffield's Case, Bright. Elec. Cas. 646; Mayor of Durham's Case, 1 Sid. 33; Bac. Abr. title "*Mandamus;*" Grant on Corp. 247–250; Willc. 378; State *v.* Common Council, 9 Wis. 254; Den *v.* Judges, 3 Hen. & Munf. (Va.) 1. Where county commissioners removed a clerk, the court ordered a peremptory *mandamus* to restore the party removed to his office, because the record did not show the ground of removal: Street *v.* County Commissioners, Breese (Ill.), 25. Where a corporate body strikes off the name of a member without notice to him, a *mandamus* to restore him will be granted: Delacy *v.* Neuse, &c. Company, 1 Hawks (North Car.), 274, 1821; Duffield's Case, Bright. Elec. Cas. 646. *Mandamus* will not lie to restore one to an office to which he is not entitled, though he may have been illegally removed: Major *v.* Randolph, 4 Watts & Serg. (Pa.) 514; People *v.* Metropolitan Police Board, 26 N. Y. 316.

to exercise the power to amove, the peremptory writ may, in the discretion of the court, be refused to compel his restoration.[1]

To Enforce Delivery and Inspection of Books and Papers.

§ 684. *Mandamus*, as we have before seen, is a proper remedy for the duly elected officer of a municipal corporation to obtain possession of the *seal*, *books*, *papers*, *and records* appertaining to such office, from his predecessor;[2] but, as elsewhere stated, the courts will not, in general, try by *mandamus* whether one person is entitled to an office actually filled by another, under commission or color of right.[3] In this country, the records, public books, and by-laws of municipal corporations are of a public nature, and if such a corporation should refuse *to give inspection* thereof to any person having an interest therein or, perhaps, for any proper purpose to any inhabitant of the corporation, whether he had any special or private interest or not, a writ of *mandamus* would lie to command the corporation to allow such inspection, and copies to be taken, under reasonable precautions to secure the safety of the originals.[4]

[1] Rex *v.* The Mayor, &c. Cowper, 523; Rex *v.* The Mayor, &c. 2 Term R. 181, 182, *per Ashhurst*, J.; Rex *v.* Bristol, 1 D. & R. 389; S. C. 5 B. & Ald. 731; *Ex parte* Paine, 1 Hill (N. Y.), 665, 667, 1841, *per Cowen*, J.; Rex *v.* Bank, 2 B. & Ald. 620. *Ante*, p. 208, note; p. 226, Sec. 192. Mr. Willcock (Munic. Corp. 379, pl. 100) states the doctrine thus: A peremptory *mandamus* to be restored "will not be granted to a public officer who admits that he was justly but irregularly amoved;" citing Rex *v.* The Mayor, &c. Cowper, 523. See, also, Rex *v.* Campion, 1 Sid. 97; Rex *v.* Oxon, 2 Salk. 429; Rex *v.* Slatford, 5 Mod. 366; Rex *v.* Ipswich, 2 Ld. Raym, 1240. *Requisites of returns* to a *mandamus* to restore: Willc. 417–424; Angell & Ames, Secs. 723–725, 729.

[2] *Ante*, p. 264, Sec. 239; People *v.* Kilduff, 15 Ill. 492, 1854; Tapping on *Mandamus*, 50, 94; 3 Bl. Com. 110; Rex *v.* Buller, 8 East. 388; Rex *v.* Hopkins, 1 Q. B. 161; Rex *v.* Greene, 6 A. & E. 549. Relator, who: Bates *v.* Plymouth, 14 Gray, 163. *Post*, Sec. 722.

[3] People *v* Head, 25 Ill. 325; People *v.* Hilliard, 29 Ill. 413, 1862; *supra*, Secs. 678–682; Tapping on *Mandamus*, 27, 28; State *v.* Pitot, 21 La. An. 336, 1869; Grant on Corp. 216, and authorities cited. Lies against mere usurpers, without color of right: Kimball *v.* Lamprey, 19 N. H. 215.

[4] *Ante*, p. 265, Sec. 240. Further, as to inspection: 1 Greenl. Ev. Secs. 471–478; Angell & Ames, Sec. 707; Tapping on *Mandamus*, 52, 95; Rex *v.* Newcastle, 2 Stra. 1223; Rex *v.* Babb, 3 Term R. 580; Rex *v.* Shelley, *ib.* 142; Rex *v.* Lucas, 10 East, 235; Rex *v.* Tower, 4 M. & S. 162.

To Enforce Duties Towards Creditors.

§ 685. *Mandamus* is one of the principal remedies by which municipal and public corporations are compelled to *perform their duties towards their creditors.* The power of the legislature over these corporations is such that it may require them to levy a tax to pay creditors, and obedience to such requirement may be enforced by *mandamus.*[1] The power of municipal corporations to make contracts and to create liabilities has been before considered,[2] and this authority imposes the duty of providing for the payment of obligations and liabilities in the special mode prescribed by law, and if no such mode is prescribed, then by the levy and collection of taxes under the provisions of the charter or other legislative act.[3] Whether the duty to provide for the payment of the liabilities of the corporation be specially enjoined, or whether it results from the general powers and nature of the corporation, it may, in all proper cases, be equally enforced by *mandamus.*[4]

[1] Commonwealth *v.* Pittsburg, 34 Pa. St. 496, 1859; Newman *v.* Justices, 5 Sneed (Tenn.), 695, 1854; *ante,* Chap. IV. Secs. 35, 36, 41; Darlington *v.* Mayor, &c. of New York, 31 N. Y. 164; Commonwealth *v.* Allegheny County, 37 Pa. St. 277; Bassett *v.* Barbur, 11 La. An. 672; Von Hoffman *v.* Quincy, 4 Wall. 535, 1866.

[2] *Ante,* Chap. XIV. on Contracts. *Post,* Chap. XXIII.

[3] Commonwealth *v.* Pittsburg, 34 Pa. St. 496, 510, 1859; Commonwealth *v.* Allegheny County, 37 Pa. St. 277, 1860. In this case, *Thompson,* J., says: "The authority to create a debt implies an obligation to pay it, and where no special mode is provided, it is implied that it is to be done in the ordinary way, by the levy and collection of taxes:" 37 Pa. St. p. 290. *Ante,* p. 23, note. See Chap. XIX. on Taxation. Hasbrouck *v.* Milwaukee, MS. 1870.

[4] *Ib.* See, also, Walkley *v.* Muscatine, 6 Wall. 481; The Mayor *v.* Lord, 9 Wall. 409; Commonwealth *v.* Allegheny County, 32 Pa. St. 218, 1858; Commonwealth *v.* Perkins, 43 Pa. St. 400; Maddox *v.* Graham, 2 Met. (Ky.) 56, 1859; Lexington *v.* Mulliken, 7 Gray (Mass.), 280, 1856; State *v.* Milwaukee, 20 Wis. 87, 1865; Von Hoffman *v.* Quincy, 4 Wall. 535, 1866; Butz *v.* Muscatine, 8 Wall. 575, 1869; Galena *v.* Amy, 5 Wall. 705, 1866; Pegram *v.* County, 64 North Car. 557, 1870; Soutter *v.* Madison, 15 Wis. 30; Flagg *v.* Palmyra, 33 Mo. 440. Hasbrouck *v.* Milwaukee, MS. 1870.

Form of alternative writ in favor of creditor: Commonwealth *v.* Pittsburg, 34 Pa. St. 496.

In *Mississippi, mandamus* is the proper remedy of the creditor to compel the county board of police to proceed to audit the claim, and when audited the party is entitled to a county warrant on the treasurer, and if there is no

§ 686. We have seen that it is a general rule, relating to the writ under consideration, that it will not lie if there be a plain and complete remedy by the more ordinary processes of the law; and this principle has been applied to the mode of compelling municipal corporations to meet their liabilities and obligations. Therefore, it has been generally, but not uni-

money in the treasury, *mandamus* will lie to compel the board to levy a tax to pay the warrant: Board, &c. *v.* Grant, 9 Sm. & Marsh. 77, 1847; Madison County Court *v.* Alexander, Walker, Rep. 523, 1832; Carroll *v.* Board of Police, 28 Miss. 38.

In *Arkansas:* Gunn *v.* County, 3 Ark. 427.

In *Wisconsin,* by construction of the statutes, judgments against incorporated cities are to be enforced, not by execution, but the amount is to be made part of the next tax roll and collected as other taxes: Crane *v.* Fond du Lac, 16 Wis. 196, 1862. But judgments in that state may be enforced by *mandamus* to levy and collect the requisite tax to pay them: State *v.* Milwaukee, 20 Wis. 87; State *v.* Beloit, *ib* 79; Soutter *v.* Madison, 15 Wis. 30.

In *Iowa,* the remedy of a creditor against county corporations (State *v.* County Judge, 5 Iowa, 380) and upon ordinary municipal indebtedness is by suit, and not by *mandamus,* where the indebtedness is in the original form, as a simple contract debt: Coy *v.* Lyons, 17 Iowa, 1; State *v.* Davenport, 12 Iowa, 335.

In *Pennsylvania,* it is held that an ordinary execution cannot be issued against a municipal corporation; that none of the property of such a corporation, whether real or personal, "necessary for governmental purposes," can be seized or sold thereon, and that the proper remedy for the judgment creditor is the *mandamus execution* provided by statute, which commands the corporation treasurer to pay the amount of the judgment out of any unappropriated moneys in his hands, and which must be obeyed by the officer whether the council have made an appropriation therefor or not. These writs have priority in the order in which they are served: Monaghan *v.* Philadelphia, 28 Pa. St. 207, 1857. *Infra,* Sec. 687, note. And, in the same state, it has been held that an action would not lie upon the resolution of a municipal corporation directing the mayor to issue certificates of debt to an individual, the only remedy being by *mandamus:* Commonwealth *v.* Lancaster, 5 Watts (Pa.), 152. *Mandamus* to county commissioners to draw *orders on county treasury* refused where the treasury has no money therein with which the orders can be paid: Price *v.* County Commissioners, 1 Whart. (Pa.) 1; S. P. Commonwealth *v.* County Commissioners, 2 *ib.* 286. Remedy of claimant against a county in Pennsylvania — when by action and when by *mandamus,* see Hester's Case, 2 Watts & Serg. 416; Commonwealth *v.* Commissioners, &c. 16 Serg. & Rawle, 317; Lyon *v.* Adams, 4 *ib.* 443; Wilson *v.* Commissioners, 7 Watts & Serg. 197.

Remedy by mandamus to compel payment of county orders or warrants or audited claims: Coleman *v.* Neal, 8 Geo. 560; *ante,* Chap. XIV. on Contracts; State *v.* Mount, 21 La. An. 352; Connor *v.* Morris, 23 Cal. 447; Keller *v.* Hyde, 20 Cal. 593; Cuthbert *v.* Lewis, 6 Ala. 262. *Mandamus* does not lie, in New

formly, held, if the creditor may bring suit against the corporation and obtain a judgment, which may be enforced by ordinary execution, that *mandamus* will not lie to compel payment, in advance of judgment obtained, and this view is the one most consistent with principle, when the matter stands wholly unaffected by legislation.[1] When judgment is ob-

York, to compel supervisors to audit and allow the amount of a tax illegally assessed and collected from the relator: People *v.* Supervisors, &c. 11 N. Y. (1 Kern.) 563. In *Iowa*, it is held that *mandamus* will not lie to compel the county auditing officer to act by either allowing or disallowing a claim against the county, for the reason that the claimant has, by an action in the courts, a plain and adequate remedy: State *v.* County Judge, 5 Iowa, 380. *Mandamus* lies to a city treasurer to compel the performance of the ministerial act of *issuing a warrant for an audited or approved bill:* State *v.* Mount, 21 La. An. 352, 369; Reynolds *v.* Taylor, 43 Ala. 420; People *v.* Brennan, 39 Barb. 536. *Mandamus* will not lie to an auditor of a county or other public corporation to draw an order when the amount has not been ascertained, and when he has by law no power to fix the amount: Putnam County *v.* Allen County, 1 Ohio St. 322; Burnet *v.* Auditor, &c. 12 Ohio, 57; State *v.* County Auditor, 19 Ohio, 116; State *v.* Mount, 21 La. An. 352; People *v.* Flagg, 17 N. Y. 584. *Ante*, Sec. 406.

When debt is payable out of a *particular fund*, the remedy is, ordinarily, by *mandamus*, and not by action: Insane Hospital *v.* Higgins, 15 Ill. 185. See *ante*, Chap. XIV. on Contracts. Liability to be sued, see *post*, Chap. XXIII. *Ante*, Sec. 413.

[1] People *v.* Clark County, 50 Ill. 213, 1869; State *v.* County Judge, 5 Iowa, 380, 383; Coy *v.* Lyons, 17 Iowa, 1; State *v.* Davenport, 12 Iowa, 335; Lexington *v.* Mulliken, 7 Gray, 280, 1856. *Supra*, Secs. 666–668.

In Chicago *v.* Hasley, 25 Ill. 595, 1861, the question was presented, whether, at common law, or *in the absence of an express statute authorizing it*, a judgment against a municipal corporation could be enforced by an ordinary *fieri facias*. The majority of the court were of opinion that such a writ was not allowable, and quashed it, holding that the only proper course for the creditor to pursue, after refusal to pay, was by *mandamus*, to compel payment, or the levy of a sufficient tax for that purpose. The conclusion that their property is exempt from sale on execution is based upon the propositions that such corporations are created for public and civil purposes; that to pay their debts, they are clothed with the power to raise money by taxation; that their property is possessed for corporate purposes, and not in the way in which it is possessed by individuals; that to levy upon and sell such property — for instance, water works, fire engines, public buildings, the revenues, &c. — would destroy the corporation, or, at least, the means of enabling it to discharge its proper functions.

As to *exemption of municipal revenues* from judicial seizure: *Ante*, p. 112, Secs. 64, 65. As to *sale of municipal property* on execution, see *ante*, Chap. XV. Sec. 446.

tained, and there is no property subject to execution out of which it can be made, *mandamus* will lie, and is the proper remedy, to compel the levy and collection of the necessary taxes to pay the judgment. When the claim is reduced to judgment, the duty to provide for its payment becomes perfect, and if it can be paid in no other way, it must be done by the levy and collection of a tax for that purpose, and this duty will be enforced by *mandamus*.[1] Indeed *mandamus*, and not a

In the absence of an express provision of law to that effect, creditors of a municipal corporation cannot, outside of the New England states, resort to the individual property of the inhabitants for the purpose of discharging a judgment against the corporation. Their remedy is by *mandamus* to compel the corporation to pay the debt by levying a tax; but the failure of the corporation to make the levy, or of the inhabitants to pay the tax, does not render their individual property liable to be taken by the creditor: Horner *v.* Coffey, 25 Miss. 434, 1853. In this case it appeared that the town of Grand Gulf was incorporated with the usual powers of contracting, suing and being sued, and levying taxes. A judgment was recovered against the corporation, on which execution was returned "*nulla bona.*" The corporation refused to levy a tax to pay the judgment, whereupon the creditor issued another execution, and levied the same upon the private property of the inhabitants. The court restrained the proceeding, holding that in the absence of *express* provision, private property could not be taken for corporate debts; and refusing to follow the doctrine laid down in Angell & Ames on Corp. Sec. 629, and in Beardsley *v.* Smith, 16 Conn. 368. *Ante*, Chap. XV. Sec. 446. *Infra*, Sec. 693, note.

[1] Supervisors *v.* United States, 4 Wall. 435, 1866; Coy *v.* Lyons, 17 Iowa, 1; Olney *v.* Harvey, 50 Ill. 453, 1869; Frank *v.* San Francisco, 21 Cal. 668; Schaffer *v.* Cadwallader, 36 Pa. St. 126; Galena *v.* Amy, 5 Wall. 705, 1866; Von Hoffman *v.* Quincy, 4 Wall. 535; Riggs *v.* Johnson County, 6 Wall. 166, 1867; Weber *v.* Lee County, *ib.* 210; United States *v.* Keokuk, *ib.* 514; State *v.* Hug, 44 Mo. 116, 1869; State *v.* Milwaukee, 20 Wis. 87, 1865; State *v.* Beloit, 20 Wis. 79, 1865; Soutter *v.* Madison, 15 Wis. 30; State *v.* Wilson, 17 Wis. 687; Watertown *v.* Cady, 20 Wis. 501. Held to lie, in a state court, to enforce a judgment in the federal court of the district; but *quære*, State *v.* Beloit, 20 Wis. 79. See *Ex parte* Holman, 28 Iowa, 88.

Where a city corporation was commanded to levy and collect a *specific* tax sufficient to pay the relator's judgment, a return showing that they had levied a tax to pay this judgment, and *other claims*, is not sufficient. Other claims cannot, in such case, be included. The return should state *facts* showing performance of the mandate, or a sufficient excuse for the non-performance of the duty enjoined: Benbow *v.* Iowa City, 7 Wall. 313, 1868. Mr. Justice *Davis*, in this case, observes: "To make the return properly responsive to the writ, it was necessary to disclose the whole act constituting the levy, so as to enable the court to determine whether it was sufficient to pay the judgment of the relator." This remark is made in relation

bill in equity, is the proper mode of compelling the performance, by a municipality, of the duty of levying a tax to pay judgments against it.[1]

§ 687. Where the law under which the debt was incurred provides for the levy of a *special tax* to pay it, this duty will be enforced by *mandamus*, and in such cases it is no answer to an application for this remedy that an execution has not been returned *nulla bona*, or that the corporation debtor may have property subject to sale on execution.[2]

§ 688. Where a municipal corporation is authorized by the legislature to create a debt of a specific character, and to borrow money to pay it, and to make provision for the payment of the principal and interest of the money so borrowed, by the assessment and collection of such taxes as may be necessary,

to that part of the return which states, in general terms, that the defendant had levied a tax sufficient to pay the judgment.

As to the right of the creditor to have the *tax*, which is ordered to be levied, *set apart* and applied to his use, see, also, Coy *v.* Lyons, 17 Iowa, 1; Galena *v.* Amy, 5 Wall. 705; Loute *v.* Allegheny County, 10 Pittsburg Legal Journal, 241; Pollock *v.* Laurence County, 7 *ib.* 373. Judgment creditor entitled, as a reward of his diligence, to priority over simple contract creditors: Coy *v.* Lyons, *supra*. *Mandamus* may be refused if the corporation has been guilty of no unreasonable or improper delay in levying the tax: State *v.* Putnam County, 19 Ohio, 415.

[1] Walkley *v.* Muscatine, 6 Wall. 481, 1867.

[2] Knox County *v.* Aspinwall, 24 How. (U. S.) 376, 1860. In this case an act of Assembly authorized the county to issue its bonds and coupons (see 21 How. 542), and made it the duty of the county commissioners, for the purpose of paying the interest due on the bonds, "at the levying of the county taxes for each year, to assess a special tax, sufficient to realize the amount of the interest to be paid for the year:" S. P. State *v.* Davenport, 12 Iowa, 335.

The rights of the creditor under a *mandamus* execution against a county, and its effect upon the county and its funds, under the statute of Pennsylvania, are very fully considered in Loute *v.* Allegheny County, 10 Pittsburg Legal Journal, 241, and Pollock *v.* Laurence County, 7 *ib.* 373. It is held by these cases that the effect of such an execution is to set apart for the creditor all unappropriated money in the treasury, and also the first that may come into it, so far as necessary, to pay the execution. See, also, Commonwealth *v.* Pittsburg, 34 Pa. St. 496, 523, as to nature of *mandamus* execution; Monaghan *v.* Philadelphia, 28 Pa. St. 207, 1857. *Supra*, sec. 685, note.

a *mandamus* is the appropriate remedy of the creditor to compel the corporation to levy and collect the taxes to pay such debt or the interest thereon.[1] And it has been several times adjudged, that where there is a duty to levy and collect a *special tax* to pay a special class of debts—as, for example, railway aid bonds—and there is no valid defence alleged or claimed, and no question made as to the genuineness of the bonds or coupons, and they are in the possession of the relator, that a prior judgment at law was not essential to give the right to a *mandamus* to compel the proper officers to levy and collect the tax.[2] Undoubtedly, in such cases, the court *may* award the writ without a prior judgment, but if there is any doubt as to the validity of the debt, the court may well decline to grant the writ until applied for to enforce a judgment obtained. And in the Federal Court, as we shall presently see, there must be a prior judgment.

§ 689. Although there may be a *discretion* in the city council *as to the amount of tax* which they are authorized to levy for ordinary purposes, yet a creditor who has obtained judgment is entitled to have the whole power of the corporation exerted,

[1] Von Hoffman *v.* Quincy, 4 Wall. 535, 1866; Walkley *v.* Muscatine, 6 Wall. 481; Commonwealth *v.* Pittsburg, 34 Pa. St. 496, 1859; State *v.* Commissioners, 6 Ohio St. 280, 1856; Flagg *v.* Palmyra, 33 Mo. 440; Commonwealth *v.* Allegheny County, 37 Pa. St. 277, 1860; Maddox *v.* Graham, 2 Met. (Ky.) 56, 1859; Supervisors *v.* United States, 4 Wall. 435, 1866; Riggs *v.* Johnson County, 6 Wall. 166; Knox County *v.* Aspinwall, 24 How. 384; Mayor *v.* Lord, 9 Wall. 409; Supervisors *v.* Durant, *ib.* 415.

[2] Commonwealth *v.* Pittsburg, 34 Pa. St. 496, 1859; Maddox *v.* Graham, 2 Met. (Ky.) 56, 1859; State *v.* Commissioners, &c. 6 Ohio St. 280, 287, 1856; Commonwealth *v.* Allegheny County, 37 Pa. St. 277, 1860; See State *v.* Davenport, 12 Iowa, 335, where the point was left open. What the relator, who is the holder of bonds issued by a municipal corporation under express authority of the legislature, must show in order to entitle him to a *mandamus* against the corporation to compel it to levy and collect a tax to pay to such bonds, see Commonwealth *v.* Pittsburg, 34 Pa. St. 496, 1859, where it is fully considered; Commonwealth *v.* Allegheny County, 32 *ib.* 218; Commonwealth *v.* Allegheny County, 37 *ib.* 277, 1860; State *v.* Milwaukee, 20 Wis. 87.

In the State *v.* Commissioners, 6 Ohio St. 280, 287, 1856, it is held that an agreement of the railroad company to pay the interest on the bonds of the county is collateral, and does not relieve the county from primary liability to the holder: Commonwealth *v.* Pittsburg, 34 Pa. St. 496, 1859.

if it be necessary, for the payment of his judgment.[1] So where an act of the legislature provided that the city council "*may, if it believe* that the public good and best interests of the city require" it, levy a tax to pay its funded debt, a judgment creditor on a debt of this character may, by *mandamus*, compel it to levy a tax if it refuses to do so.[2] So, also, where an act of the legislature declared that the "board of supervisors of counties owing debts which their current revenue, under existing law, is not sufficient to pay, *may, if deemed advisable*, levy a special tax, to be used in liquidation of such indebtedness," the Supreme Court of the United States held that this power was mandatory if its exercise was necessary in order to pay judgments rendered against the county.[3] The court places the decision upon the principle that where power is given to public officers, though conferred in language which is permissive in form, it will be regarded as peremptorily imposing a positive and absolute duty, whenever public interests and individual rights call of right for its exercise, and distinguishes the case from those which involve the exercise of a discretion, judicial in its nature, and which the courts cannot control.[4]

§ 690. If the municipal officers fail or neglect to perform the duty of levying a tax at the *annual or regular meeting*, they may be compelled by *mandamus* to meet again and do their duty, the same as if it had been performed at the proper time and place, and this without the aid of any special legislative enactment.[5]

[1] Coy *v.* Lyons, 17 Iowa, 1, 1864; Butz *v.* Muscatine, 8 Wall. 575, 1869, overruling Clark *v.* Davenport, 14 Iowa, 494; Commonwealth *v.* Pittsburg, 34 Pa. St. 496, 513, 517, 1859. As to limitation on rate or amount of taxation, see Butz *v.* Muscatine, *supra; ante*, p. 149, Sec. 107; Chap. XIX. on Taxation.

[2] Galena *v.* Amy, 5 Wall. 705, 1866.

[3] Supervisors *v.* United States, 4 Wall. 435, 1866.

[4] As to mandatory and discretionary powers, see, further: *Ante*, p. 110, Sec. 62; *supra*, Sec. 669; People *v.* Supervisors, 12 Johns. 416.

[5] People *v.* Supervisors, 8 N. Y. (4 Seld.) 317, 330, 1853, and prior cases in that state, cited by *Willard*, J.

§ 691. On the ground that where the law absolutely requires a ministerial act to be done by a public officer, and he neglects or refuses to do it without sufficient legal excuse, he is *liable in a private action* to the person injured by his misconduct, the Supreme Court of the United States held where a judgment creditor of a public corporation had procured a peremptory *mandamus* to county supervisors to levy a tax sufficient to pay his judgment, which they refused or neglected to obey, that they were liable to him in a civil action in damages to the extent of the injury thereby occasioned. The court observed that a mistake as to their duty or honest intentions would constitute no defence to such an action, but it gave no opinion as to the rule by which to measure the damages — that is, whether the plaintiff would be limited in his recovery to the actual injury sustained, or whether his recovery would be the amount of his judgment, with interest.[1]

§ 692. The power to issue the writ of *mandamus* as an original and independent proceeding has not been conferred by congress upon the *Circuit Courts of the United States*, and these courts are authorized only to issue this writ when ancillary to a jurisdiction already acquired.[2] Applying this rule, the Supreme Court of the United States has decided that the holder of coupons attached to bonds issued by a public corporation, and which have not been put into judgment, is not entitled to a *mandamus* from the federal Circuit Court to compel the levy and collection of a tax to pay such coupons.[3]

[1] Amy *v.* Supervisors, 11 Wall. 136, 1870. The refusal of the treasurer of a public corporation to pay a certified demand against the corporation will not, unless, perhaps, where it can be shown that the refusal was wilful, and that he had funds in his hands applicable to the purpose for which they were demanded, make the treasurer *personally responsible* in an action at law, and the appropriate remedy of the party injured is, by *mandamus*, to compel him to make payment: Huff *v.* Knapp, 1 Seld. (N. Y.) 65, 1851, affirming S. C. 3 Sandf. Superior C. R. 299. See Bartlett *v.* Crozier, 17 Johns. 458; The People *v.* Lawrence, 6 Hill (N. Y.), 644. *Supra*, Sec. 666, note. Further, as to *personal liability* of public officers: *Ante*, p. 210, Sec. 176, and note.

[2] McIntyre *v.* Wood, 7 Cranch, 504; McClung *v.* Silliman, 6 Wheat. 601; Kendall *v.* United States, 12 Pet. 584; The Secretary *v.* McGarrahan, 9 Wall. 311; County of Bath *v.* Amy, Supreme Court United States, December term, 1871 (not yet reported).

[3] County of Bath *v.* Amy, *supra*. *Ante*, Chap. XIV. on Contracts.

§ 693. But where the Circuit Court of the United States has rendered a judgment against a public or municipal corporation, it has the authority, under the fourteenth section of the judiciary act of 1789, to issue the writ of *mandamus* where it is the appropriate remedy to enforce such judgment. By means of this writ, the Circuit Court of the United States may compel the officers of public and municipal corporations, though deriving their existence from state legislation, to perform their duty to levy and collect the necessary taxes to pay judgments rendered therein against such corporations. The writ of *mandamus*, when so issued, is the final process of the court for the enforcement of its judgment, and performs, in substance and effect, the office of a writ of execution; and it is considered by the Supreme Court of the United States to be a writ necessary to render effectual the jurisdiction of the Circuit Court, which attached when the action was commenced, and which existed when the judgment was rendered, and which continues until it is collected. It is a result of these principles, and of the nature of the relations of the national and state jurisdictions, that neither the state legislatures nor the state courts can enjoin, or in any manner interfere with, the federal tribunals in the exercise of the power of enforcing their own judgments.[1] To enforce the payment of judgments rendered therein, the federal courts, on the refusal of the state officers to levy taxes as commanded, have, in a few instances, exercised, though with expressions of reluctance, the high and delicate authority of appointing the United States Marshal as

[1] Riggs *v.* Johnson County, 6 Wall. 166, 1867, which is the leading case on this subject. Approved and followed: Weber *v.* Lee County, *ib.* 210; United States *v.* Keokuk, *ib.* 514, 518; Supervisors *v.* Durant, 9 Wall. 415; The Mayor *v.* Lord, *ib.* 409; Amy *v.* Supervisors, 11 Wall. 136, 1870; Knox County *v.* Aspinwall, 24 How. 376, 384, 1860. *Ante*, Chap. XIV. Secs. 415–422.

Illustrative of the controversy between the federal and state authority in Iowa, growing out of municipal railway aid bonds, see: Riggs *v.* Johnson County, 6 Wall. 166; Weber *v.* Lee County, *ib.* 210; United States *v.* Keokuk, *ib.* 514, 518; Lee County *v.* Rogers, 7 Wall. 181, 1868. *Ante*, Chap. XIV. Secs. 415–426; Holman, *Ex parte*, 28 Iowa, 88, 1869. In King *v.* Wilson, 1 Dillon, C. C. 555, 1871, the history of the state adjudications is given on the subject of municipal aid to railways. *Ante*, p. 144, Sec. 104.

a commissioner for that purpose. The decisions on this subject are referred to in the note.[1]

[1] Supervisors *v.* Rogers, 7 Wall. 175, 1868. The appointment of the marshal, in this case, as such commissioner, was considered to be authorized by the statute of the state (Revision of Iowa of 1860, Sec. 3770), adopted in this particular case, and not by a general rule of practice. See, also, Lansing *v.* County Treasurer, 1 Dillon, C. C. 522, 1870; Welch *v.* Ste. Genevieve, *ib.* 130, 1871.

In Morgan *v.* Beloit, in the United States Circuit Court for Wisconsin, the question of the right of a judgment creditor of a municipality which would not levy and collect the necessary taxes to pay his judgment, *to resort to equity* for relief, was presented. The debt of the town, in that case, was incurred under a special act of the legislature, approved February 10, 1853, authorizing the town of Beloit to issue bonds in aid of a railroad, and the 3d section of the act provided that "the board of supervisors of the town of Beloit, *whenever the same shall become necessary, shall annually levy a tax upon the taxable property of said town*, sufficient to pay the interest upon such bonds, after deducting the dividends due to such town on said shares of stock." The complainant recovered a judgment in the federal court in 1860, and a peremptory *mandamus* was issued in 1862, commanding the board to levy a tax to pay the judgment, but, by repeated resignations, causing vacancies and want of quorum, no tax had ever been levied, and no attachments for contempt (as the bill alleged) could be had or made effectual. The bill made the town, in its *corporate capacity*, and its *inhabitants, defendants*, and asked for a decree subjecting the taxable property of the town and of the inhabitants to sale at auction by the marshal. A demurrer to the bill was sustained and the bill dismissed by *Miller*, District Judge, holding the Circuit Court. On appeal, the Supreme Court, after one argument, ordered a re-argument upon this question: "Whether or not it is competent for the Circuit Court of the United States, on a bill filed for the purpose, to appoint a master or commissioner to levy and collect a tax, under and in pursuance of the 3d section of an act passed by the legislature of Wisconsin, February 10th, 1853, upon the taxable property of the town, sufficient to pay the judgment of the plaintiff, in case of a refusal of the supervisors of the town to levy the same, after service of a peremptory writ of *mandamus*." At the December term, 1869, the decree below, dismissing the bill, was affirmed by an equal division of opinion, there being at the time eight judges on the bench. No opinions were delivered, and no report of the case has been published. The arguments of counsel (Mr. Carpenter for the bill, and Messrs. Palmer and Ryan, *contra*) were mainly addressed to the question of *equity jurisdiction* in such a case, and the right to subject the *private property* of the inhabitants to the payment of the debts of the municipality. *Ante*, p. 641, note. *Supra*, Sec. 446.

In Rees *v.* Watertown, in the Circuit Court of the United States for the western district of Wisconsin, June term, 1872, the bill, which was similar to the one in the case of Morgan *v.* Beloit, *supra*, was dismissed, *Hopkins*, District Judge, expressing an opinion against the right claimed, and *Drum-*

Application for the Writ — Relator — Rule Nisi.

§ 694. It is not our purpose to treat at large of the proceedings and practice in respect to the remedy by *mandamus*. We shall refer to these in a general way only, in order the better to illustrate the application of the writ to municipal corporations and municipal officers. The practice in the different states is as at common law, modified by statutory enactment. The writ is not granted, of course, but upon motion, based upon affidavits, or upon a suggestion supported by oath, which must be drawn up with precision, and state with clearness and certainty the grounds for the application, and must also show a case in which the writ lies. If there be another remedy apparently adequate and complete, the affidavits must show why it is not sufficient or why it would prove ineffectual.[1]

mond, Circuit Judge, in view of the diversity of opinion among the judges in Morgan's case, concurring in that disposition of the matter.

In Hubbell *v.* Waterloo (town of), the Circuit Court of the United States for the eastern district of Wisconsin (present, *Drummond* and *Miller*, JJ.), in April, 1872, in an application in a *mandamus* proceeding supplemental to a judgment against the town of Waterloo for the appointment of the marshal as commissioner to levy and collect the taxes, which the local officers evaded, and refused (by successive resignations) to levy and collect, the judges were divided in opinion as to the power of the court to make the appointment, and the question was certified to the Supreme Court of the United States, where it is understood to be now pending.

[1] Rex *v.* Oxford, 7 East, 345; Buller's *Nisi Prius*, 201; Stephens' *Nisi Prius*, 2318; Willc. 357, pl. 43, 44; Rex *v.* Margate Pier Company, 3 B. & Ald. 221, 224; People *v.* Supervisors, 27 Cal. 655; People *v.* Chicago, 51 Ill. 17. An alternative writ stands in the place of the declaration in an ordinary action, and must show a good *prima facie* case, or it is demurrable: *Ib.*; People *v.* Ransom, 2 Comst. 490; Hoxie *v.* Commissioners, 25 Maine, 333; Canal Trustees *v.* People, 12 Ill. 254; State *v.* Bailey, 7 Iowa, 390; State *v.* Haben, 22 Wis. 660; People *v.* Hilliard, 29 Ill. 413; People *v.* Baker, 35 Barb. 105; State *v.* Board, &c. 10 Iowa, 157.

"In practice," says *Thompson*, J., "the party seeking the remedy by *mandamus* presents to the court a *prima facie* case, entitling him to the writ by way of suggestion [or by affidavit or sworn information]. This being in proper form and sufficient in substance, an alternative *mandamus* may be awarded upon it, reciting the complaint of the relator and his demand for redress, and commanding the party to whom it is directed either to obey it or return his reasons for not doing so. This alternative is what gives the denomination of 'alternative *mandamus*' to the first writ. The establish-

§ 695. Where the application for the writ relates to a matter affecting the public, such as the enforcement of an act of the legislature for the public benefit, the state or its attorney, in a proper case, is entitled to the writ as of right.[1] It has been held sufficient to entitle a person to become an applicant or relator in such cases that *he* is interested as a citizen;[2] but the cases on this point are not entirely uniform. Accordingly, a voter in a municipality may apply for a *mandamus* to compel

ment of a duty, and the obligation to perform it, is upon the plaintiff to show, and this is considered as done, *prima facie*, when the court awards the writ. The respondent, upon service of it, is bound either to obey, or show that the plaintiff has no right to demand obedience, or that no duty exists which he can be compelled to perform. Whenever this is not accomplished by a demurrer, or by a general traverse of the facts set forth in the writ, it is generally done by matters averred in the return by way of confession and avoidance:" Commonwealth *v.* Allegheny County, 37 Pa. St. 277, 279, 1860.

If there be no special *statute limitation*, the application for the writ may be made within the period given by statute for bringing ordinary actions for similar injuries: People *v.* Supervisors, 12 Barb. 446. But the writ, not being one of right, there is a discretion to refuse it if the applicant has been guilty of unreasonable laches and delay in asserting his right: The Queen *v.* Halifax Road Trustees, 12 Q. B. 442; Savannah *v.* State, 4 Geo. 26; Rex *v.* Lancashire, 12 East, 366; Rex *v.* Canal Company, 1 M. & S. 32; Regina *v.* Canal Company, 11 A. & E. 316; True *v.* Melvin, 43 N. H. 503.

If no just and useful purpose requires the writ of *mandamus* to be granted, the court has discretion to refuse it: State *v.* Graves, 19 Md. 351, 374; Williams *v.* Commissioners, 35 Maine, 345; People *v.* Supervisors, 15 Barb. 607; People *v.* Pratt, 30 Cal. 223. So in a case where the substantial right claimed by the relator is doubtful: Insurance Company *v.* Wilson's Heirs, 8 Pet. 291; People *v.* Chicago, 51 Ill. 17; Stephens' *Nisi Prius*, 2293. Or is insignificant, as where only two dollars are involved: People *v.* Hatch, 33 Ill. 9.

[1] Tapping on *Mandamus*, 54, 56, 288. Thus, where the application is to proceed to the election of burgess in the place of one deceased, the motion is *ex debito justitiæ*, and there is no discretion to refuse the writ: *Ib.*; State *v.* Railroad Company, 29 Conn. 538; People *v.* Attorney General, 22 Barb. 114; People *v.* Tracy, 1 Denio, 617.

[2] Pike County *v.* State, 11 Ill. 202; Ottawa *v.* People, 48 Ill. 233; Regina *v.* Archbishop, 11 Q. B. 578; People *v.* Halsey, 53 Barb. 547; People *v.* Brooklyn, 22 Barb. 404; Hamilton *v.* State, 3 Ind. 452; People *v.* Collins, 19 Wend. 56; Moses on *Mandamus*, 197 — author's opinion; *Ex parte* Fuller, 25 Ark. 261; People *v.* San Francisco, 36 Cal. 594; Bryan *v.* Cattell, 15 Iowa, 538; compare Sanger *v.* Commissioners, 25 Maine, 291; People *v.* University Regents, 4 Mich. 98, 1856; People *v.* Prison Inspectors, *ib.* 187; Bates *v.* Plymouth, 14 Gray, 163.

the council to hold an election to fill a vacancy in their body,[1] or to test the validity of an election.[2] In this country the writ is resorted to for the enforcement, in proper cases, of individual rights, or rights of a private nature, in the absence of any other adequate legal remedy, and to prevent a failure or defect of justice; and, in such cases, the party really or beneficially interested in the performance of the legal duty which the defendant neglects or refuses to perform may apply for the writ.[3]

[1] State *v.* Rahway, 33 N. J. (Law) 110, 1868.

[2] State *v.* County Judge, 7 Iowa, 186; State *v.* Bailey, *ib.* 390.

[3] Commonwealth *v.* Allegheny County, 37 Pa. St. 277, 279, 1860; Bryan *v.* Cattell, 15 Iowa, 538, *per Wright*, J.; Ottawa *v.* People, 48 Ill. 233, 1868; Maddox *v.* Graham (right of municipal creditors), 2 Met. (Ky.) 56, 1859; The People *v.* Pacheco 29 Cal. 210; Marbury *v.* Madison, 1 Cranch, 137; Kendall *v.* Stokes, 3 How. (U. S.) 87. As to the rights of tax-payers: *Post*, Chap. XXII. See Rex *v.* Frost, 8 A. & E. 822, for a case in which an individual having a remote interest in corporation funds was held not entitled to the writ.

Who may be a relator: The *inhabitants of a county* who are put to inconvenience in reaching the court house have such an interest in the erection of a new one in the new county site as will authorize them, as relators, to sue out a *mandamus* to the proper authorities or officers to proceed to the construction of the new court house, as provided by law, and to levy taxes pursuant to the requirements of the statute: Watts *v.* Carroll Parish, 11 La. An. 141, 1856. *Supra*, Sec. 672.

Under a provision in the *Ohio* code (Sec. 570), that the writ "may issue on the information of the party beneficially interested," the writ may properly issue, and the proceedings be conducted in the name of the *state* on the relation of the party interested: State *ex rel.* &c. *v.* Commissioners of Perry County, 5 Ohio St. 497, 1856; State *v.* Zanesville, &c. Company, 16 Ohio St. 308, construing the phrase, "beneficially interested."

In *Iowa*, by statute, the writ and proceeding are in the name of the state if a public interest be involved, and of the relator if only a private interest is concerned: Revision of 1860, Sec. 3761; State *v.* County Judge, 2 Iowa, 280; State *v.* Bailey, 7 Iowa, 390. And in a matter of public right, any citizen may be the relator in an application for a *mandamus*: State *v.* County Judge, 7 Iowa, 186.

An act of the legislature specially commanded the town council to open a certain alley, and it was held that the incidental advantages which a certain person would derive from the opening of the alley by reason of the location of his property, did not entitle *him* to a *mandamus* to compel the performance of the duty enjoined by the act, the relator's right being regarded as one held in common with other inhabitants of the place: Heffner *v.* Commonwealth, 28 Pa. St. 108, 1857. But see Chap. XVIII. on Streets, *ante*. So where an obstruction to a sidewalk is no more injurious to the relators than to others, and where there is a remedy by indictment, it was

§ 696. When the writ is sought to enforce individual rights, the affidavits must show in the applicant or relator a *prima facie* case, and that he has complied with every requisite, to perfect his right to this remedy. Thus, as it is, in general, necessary that the *defendant should have been requested* to do that of which performance is sought by means of the writ (the object being that he shall have the option to do or to refuse that which is demanded), the affidavits must show the demand and the neglect or refusal, or circumstances, such as unreasonable delay, or neglect to discharge a public duty, which clearly evince an intention not to do the act required.[1]

§ 697. If the affidavits, information, or petition under oath, show the case to be one in which the writ lies, and make out a *prima facie* case for the applicant, a rule is granted upon the defendants, that is, to the persons to whom the writ is to be directed, *to appear and show cause* why the writ shall not issue. In the practice in this country the rule *nisi*, or notice, is often dispensed with, and an alternative writ granted *ex*

held that *mandamus* was not the proper remedy to compel the city council to open streets and to remove encroachments thereon: Reading *v.* Commonwealth, 11 Pa. St. 196, 1849. *Ante*, Secs. 521, 522.

Canal appraisers, appointed by the state to appraise damages, and who, in a case within the statute, refuse to act, will be compelled to proceed by *mandamus*, and estimate the relator's damage, and pay the same: *Ex parte* Jennings, 6 Cow. 518, case growing out of the construction of Erie canal; People *v.* Seymour, 6 Cow. 579; *Ex parte* Rogers, 7 Cow. 526, 1827.

[1] State *v.* Rahway, 33 N. J. (Law) 110, 1868; Tapping on *Mandamus*, 283; Willc. 357, pl. 44; State *v.* Lehre, 7 Rich. (South Car.) 322; Commonwealth *v.* Allegheny County, 37 Pa. St. 237, 1860; Angell & Ames, Sec. 707, and cases cited; Commonwealth *v.* Allegheny County, 37 Pa. St. 277, 291, 1860, *per Thompson*, J.; People *v.* State Treasurer, 4 Mich. 27; Stephens' *Nisi Prius*, 2292, 2318, 2319; Maddox *v.* Graham, 2 Met. (Ky.) 56, 70, 1859.

Further, as to *demand and refusal, and when necessary:* Tapping, 285, 286; Rex *v.* Canal Company, 3 Ad. & E. 217; *ib.* 477. But an objection for want of demand may come too late after the merits of the case have been heard; Tapping, 287; approved, State *v.* Lehre, 7 Rich. 322. The board of supervisors of a county were directed by statute to meet at a specified place and time, and then and there subscribe a specified sum to the stock of a railroad company, and it was held that the company must tender its books to the officers of the county and demand the subscription, before it could apply for a *mandamus* to compel the county to subscribe: Railroad Company *v.* Plumas County, 37 Cal. 354, 1869.

parte in the first instance.[1] If, upon the rule *nisi*, or notice, the defendant does what is sought, the rule will be discharged. The defendant may show for cause, by affidavits, that the case is not one in which the writ lies, that there is a specific and adequate legal remedy, or that the relator or applicant has no title or right to the writ, or that by his neglect or misconduct he is not entitled to the benefit of the remedy, or the assistance of the court. If after the defendant has shown cause there remains a reasonable ground of right in the applicant, the rule for a *mandamus* will be made absolute, and an alternative writ will issue, which must substantially follow, and not materially vary from, the affidavits, petition, or rule upon which it is founded.[2]

Form, Direction, and Service of the Writ.

§ 698. The writ of *mandamus* has the usual formalities of other writs, but *no precise formula* is necessary in the language to be employed in framing it. It must show with certainty the duty to be performed, and command those to whom it is directed to perform some specific and definite act or acts. It must follow the rule, or affidavits, or information upon which it is founded, must be properly directed, must bear test in term time, and, under the practice at common law, it must be tested on the very day on which the rule for the writ is made absolute.[3]

[1] State *v.* Fairchild, 22 Wis. 110, 1867; State *v.* Lean, 9 Wis. 279; Chance *v.* Temple, 1 Iowa, 179.

[2] 3 Blacks. Com. 110, 111; Willc. 387.

[3] Commonwealth *v.* Pittsburg, 34 Pa. St. 496, 1859; Rex *v.* Dublin, 1 Stra. 540; Selwin's *Nisi Prius*, 1061; Sterling's Case, 1 Sid. 340; Rex *v.* Willis, 7 Mod. 262; Rex *v.* Kingston, 8 Mod. 210; S. C. 11 Mod. 382; S. C. 1 Stra. 578; Rex *v.* Wildman, 2 Stra. 880; Willc. 387; Rex *v.* Conyers (teste), 8 Queen's B. 981; Stephens' *Nisi Prius*, 2321; Chance *v.* Temple, 1 Iowa, 179, where the practice is fully stated by *Isbell*, J.; Price *v.* Harned, 1 Iowa, 473.

The duty required must be specifically stated, and not in the alternative, as that a municipal corporation pay a judgment, *or* issue its bonds in payment, *or* levy a tax to pay it: State *v.* Milwaukee, 22 Wis. 397; Rex *v.* Kingston, *supra;* Tapping, 327. The command must be to perform the act, and not to command others to perform it: Rex *v.* Derby, 2 Salk. 436.

When there is no rule of law or rule of court controlling it, the writ may be *made returnable* at the same term it is issued, or at the next term, in the discretion of the court: Harwood *v.* Marshall, 10 Md. 451; Fitzhugh *v.* Custer, 4 Texas, 391; State *v.* Jones, 1 Ire. (North Car.) 129.

§ 699. The *direction of the writ* is one of the most material portions of it; and it must be directed to the persons or officers, or to the corporate body legally bound to execute it, and it should be directed to such only. The common law consequence of a failure to observe this rule is, that the writ may be either superseded or quashed. If a *joint act* is to be performed by two or more, the writ must be directed to all, though only a portion have refused to do the act, and the rest are willing.[1] The writ, when directed to a corporate body, should state the title of the corporation with accuracy, using the name prescribed by charter or statute; if there be none such, and a name has been acquired by reputation, the writ may be directed accordingly:[2] the effect of misnaming the corporate body is that the writ will be quashed, unless by the law, or the practice of the particular state, it may be amended.[3] But in some cases, there is an option to direct the writ either

[1] Tapping on *Mandamus*, 310, where an alphabetical series of the usual *directions* of the writ in England is given: People *v.* Yates, 40 Ill. 126; State *v.* Jones, 1 Ire. (North Car.) 129; Rex *v.* Hereford 2 Salk. 701; Buller, *Nisi Prius*, 204.

[2] *Ante*, p. 161 Sec. 119, p. 162, Sec. 120; Rex *v.* Smith, 2 M. & S. 598; Estwick *v.* London, Sty. 43, 32; Carpenter's Case, Raym. 439; Tapping, 314; Tavener's Case, Raym. 446.

[3] Mayor *v.* Lord, 9 Wall. 409, 1869; Tapping on *Mandamus*, 314.

Amendments: In England the statute of 9 Anne, Chap. XX. Sec. 7 extended the statutes of *jeofails* "to all writs of *mandamus* and information in the nature of *quo warranto*, and all the proceedings thereon for any of the matters in this act mentioned." As to the extent of the right in England to amend the writ, and the return: Willc. 433–437; Commonwealth *v.* Pittsburg, 34 Pa. St. 496, 515. In this last case *Strong*, J., remarks: "Formerly, when the doctrine of amendments remained as at common law, the court would not allow the writ of *mandamus* to be amended after return filed; but, as is said by *Tapping*, p. 334, the strict rule of the common law has been, of late years, altogether departed from, the principle as to amendment which now obtains being, that it shall be allowed in all cases when such a course will promote justice. Thus, in a late case, the court ordered the writ to be amended during an argument, in order that such argument might proceed independently of such objection; Rex *v.* Newbury, 1 Queen's B. 759. Further, as to amendments: Willc. 433; Stephens' *Nisi Prius*, 2324; Jones *v.* State Auditor, 4 Ohio St. 493; Supervisors *v.* Durant, 9 Wall. 736, 1869; State *v.* Milwaukee, 22 Wis. 397; Commissioners *v.* People, 38 Ill. 347; State *v.* Elwood, 11 Wis. 17; State *v.* Hastings, 10 *ib.* 518; Springfield *v.* Hampden, 10 Pick. 59. Writ and information amendable: State *v.* Bailey, 7 Iowa, 390; Chance *v.* Temple, 1 Iowa, 179, State *v.* Keokuk, 18 Iowa, 388; State *v.* County Judge, 12 Iowa, 237.

to that *part* of the corporation which alone has the power to execute it, and on which alone the particular duty rests, or to the *whole corporation* by its corporate name or title.[1]

§ 700. We have heretofore pointed out the difference between an old English municipal corporation, consisting of integral parts or different classes, and the American municipal corporations,[2] and this distinction is to be regarded in the application of the decisions of the English courts respecting the direction of writs of *mandamus*. In England, if the act commanded must be done by the whole corporation, the writ should be directed to the corporation in its corporate name, and not by an enumeration of the classes which compose the corporation, nor to all the members as individuals. Thus, if the corporation be styled "Mayor and Commonalty," but consist of mayor, aldermen, and burgesses, the writ must be directed to the "Mayor and Commonalty" (that being the corporate name), and it must be so directed, although the mayor,

If it appears to the court that the relator is entitled to a *mandamus* the writ will not be quashed because the petition or suggestion or affidavits do not state that the relator is without other adequate remedy; People *v.* Hilliard, 29 Ill. 413.

[1] Tapping on *Mandamus*, 315 317. The author here refers to the English cases under the old corporations on this subject, and observes that "The result of the above cases, therefore, is, that if the writ be directed neither to the corporation by its corporate name, nor to those who should execute it by their proper descriptions [but 'in terms extends the description beyond the part legally liable to execute the writ'], it is clearly bad, and is liable either to be superseded or quashed:" *Ib.* 317; Rex *v.* Smith 2 M. & S. 598; Rex *v.* Abington, 2 Salk. 700; Rex *v.* Norwich, 1 Stra. 55; Pees *v.* Leeds, *ib.* 640. "The writ," says Mr. *Willcock* (Corp. 389, pl. 135, 137), "may be directed in the corporate name, although the act commanded is to be done by a select body, without the interference of the rest; for their act in such capacity is the act of the corporation;" "yet, where the act is to be done by a select body alone, the writ may be directed to them alone in their name as a select body."

"If the writ is directed to the corporation, it has been held good. But if it be directed to those who, by the constitution of the corporation, ought to do the act, without doubt it is good also:" *Per Holt*, C. J., Rex *v.* Abingdon, 1 Ld. Raym. 560. See, also, Rex *v.* Oxford, 6 Ad. & E. 349; Rex *v.* Abingdon, 2 Salk. 700; Rex *v.* Hereford, 1 Ld. Raym. 559; Regina *v.* Ledgard, 1 Ad. & E. (N. S.) 616; Regina *v.* Stamford, *ib.* 433.

[2] *Ante*, Chap. III.

who is an integral part of the corporation, be dead.[1] Our municipal corporations do not consist of integral parts and distinct classes, but usually have a specific name, and their legislative powers are exercised by a council. These circumstances influence the direction of the writ, for, as we shall presently see, the writ, in all cases where the duty to be performed rests upon the council, may be directed to the corporation by its corporate name, or to the officers composing the council in their official capacity.

§ 701. In this country, the ancient strictness in respect to the direction of the writ is somewhat modified by judicial decision and statutory enactment. Where there is a duty resting on the corporation to levy taxes for the benefit of its bondholders or creditors, the writ may be directed to the individuals, in their official capacity, composing the council or other body, whose duty it is to make the levy and who have the power to execute the writ; and in such a case, the writ may also, we think, be properly directed to the corporation by its corporate name, and be served upon the officers thereof, who have the power, and whose duty it is to execute it.[2]

[1] Rex *v.* Smith, 2 M. & S. 598; Rex *v.* Abingdon, 1 Ld. Raym. 560; Rex *v.* Plymouth, 1 Barnard. 81; Rex *v.* Cambridge, 4 Burr. 2011. Under the Municipal Corporations Act, 5 and 6 Will. IV. Chap. LXXVI. *ante*, p. 47, "the corporation," says Mr. *Grant*, "acts by the agency of the council, and, therefore, the acts of the council are the acts of the corporation. Hence, a *mandamus* ought to be directed to the corporation by their corporate name, though the thing in it required to be done is, by the statute, to be done by the council:" Grant on Corp. 355, note; citing Rex *v.* Oxford, 6 Ad. & E. 349; Rex *v.* Gloucester, 3 Bulst. 190; Rex *v.* Abingdon, 2 Salk. 699; Rex *v.* Hereford, *ib.* 701; Regina *v.* Ledgard, 1 Q. B. 620, 621; Mayor, &c. *v.* Regina, 10 Q. B. 574, 579.

[2] Commonwealth *v.* Pittsburg, 34 Pa. St. 496, 1859; The Mayor (of Davenport) *v.* Lord, 9 Wall. 409, 1869; Maddox *v.* Graham, 2 Met. (Ky.) 56, 1859; Louisville *v.* Kean, 18 B. Mon. 9, 13, 1857. In Commonwealth *v.* Pittsburg, above cited, the writ was directed, "To the Select and Common Councils of the City of Pittsburg, composed of D. Fitzsimmons" and others [stating the names of all the individuals composing the said bodies, without discriminating which of the persons named belonged to the select, and which to the common, council], and the writ was held to be well directed, although the corporate name of the city was, "The Mayor, Aldermen, and Citizens of Pittsburg." The misdirection of the writ was set up in the return, and in treating of the objection, *Strong*, J., delivering the opinion of

§ 702. A *distinction is to be observed between a misdirection*, by being directed to the wrong persons, and a direction to the

the court, observes: "The next averment of the return is, that there is no such corporation or body politic known to the law as the City of Pittsburg, of whose councils, select or common, the persons named in the writ are supposed to be members, but that the corporate name is, 'The Mayor, Aldermen, and Citizens of Pittsburg.' The writ is directed to the select and common councils of the city of Pittsburg, composed of D. Fitzsimmons and others, defendants. It is not directed to the city, but to the individuals who constitute the select and common councils. The question is not, therefore, whether, if an action had been brought at law against the city of Pittsburg, the misnomer might have been pleaded in abatement, for it is not the corporation which is sued. But even if it were, the mistake is amendable. Formerly, when the doctrine of amendments remained as at common law, the court would not allow a writ of *mandamus* to be amended after return filed; but, as is said by Tapping, p. 334, the strict rule of the common law has been, of late years, altogether departed from; the principle as to amendment, which now obtains, being that it shall be allowed in all cases when such a course will promote justice. Thus, in a late case, the court ordered the writ to be amended during an argument, in order that such argument might proceed independently of such objection (Rex *v.* Newbury, 1 Q. B. 759). It needs no argument to prove that justice would not be promoted by turning the relator out of court because he has described the defendants as members of the select and common councils of Pittsburg instead of members of the select and common councils of 'the mayor, aldermen, and citizens of Pittsburg.' Even the very act which incorporated the city more than once denominates it the city of Pittsburg. One of our statutes of amendments authorizes an amendment of the record of any action in any stage of the proceedings when it shall appear, by any sufficient evidence, that a mistake has been made in the Christian name or surname of any party, plaintiff or defendant. As statutes of *jeofails* are construed liberally, it would seem to be within the spirit of this act to allow an amendment of a corporate name when a corporation is a party; but whether it would or not, need not now be decided, for the *mandamus* is not, to the artificial being, known either as the city of Pittsburg or as 'the mayor, aldermen, and citizens of Pittsburg.' It is not, therefore, misdirected. Next, the return avers that the select and common councils are not integral parts of the corporation, but only several and co-ordinate branches of the legislature thereof, acting separately and independently of each other; that the concurrence of both bodies is essential to the validity of all legislative acts affecting the corporation; and that the defendants are without power, of themselves, to assess or impose taxes, or to compel the concurrence of the other branch of said councils in any act. We do not perceive that this is any answer to the mandate of the writ, and no attempt has been made to show us how the fact averred is material. The defendants are *all* the members of *both branches*, and if each discharges his duty, there can be no want of concurrence of councils:" 34 Pa. St. 496, *supra*. See, also, Rex *v.* Tregony (mayor of), 8 Mod. 111.

right persons by an erroneous name. In the former case, the writ may be superseded on motion, while in the latter case the defect must be relied upon in the return, and the objection is in the nature of a plea in abatement.[1]

§ 703. It is advisable that *writs to officers* to perform an official duty should be directed to them in their official names, as "To the Mayor and Aldermen of," &c., omitting the personal names of the officers, as this course precludes questions which might be made arising from a change of officers.[2] The writs must be directed to officers in their proper capacity.

In The Mayor (of Davenport) *v.* Lord, above cited, it appeared that the municipality was incorporated by the name of "The City of Davenport," and by *that* name had power "to sue and be sued in all courts," and that the "city council," which exercised all the legislative powers of the corporation, and had the sole power to levy and collect taxes, was composed of the mayor and aldermen, and a writ of *mandamus* in favor of a judgment creditor of the city, commanding the levy of taxes to pay the judgment, was directed "To the Mayor and Aldermen" of the city. The objection was made that the writ ought to have been directed to the city by its corporate title, but the objection was not sustained. The view of the Supreme Court was, that since the affairs of the city were managed by the mayor and aldermen composing the city council, which had the sole power to levy and collect taxes and provide for the payment of the debts of the corporation, the writ was well enough directed. The exact language of the court is: "The point that the writ was misdirected is not well taken — the direction was *substantially correct*." There can, we think, be little doubt that the writ could have been properly directed to the corporation by its corporate title, and as the duty was a corporate one, though to be performed by the council, the direction of the writ in such a case to the corporation, by its charter name, and service upon the proper officers, would seem to be an equally appropriate mode.

[1] Rex *v.* Smith, 2 M. & S. 598; Rex *v.* Ipswich, 2 Ld. Raym. 1239; S. C. 2 Salk. 435; Rex *v.* Norwich, 1 Stra. 55; Willc. 388, pl. 131.

[2] Tapping on *Mandamus*, 315, 317; Louisville *v.* McKean, 18 B. Mon. 9, 13, 1857; *infra*, Sec. 712; State *v.* Elkinton, 1 Vroom (N. J.), 335; Beachy *v.* Lamkin, 1 Idaho, 48; State *v.* Gates, 22 Wis. 210; People *v.* Bacon, 18 Mich. 247; Soutter *v.* Madison, 15 Wis. 30; Rex *v.* West, Looe, 3 B. &. C. 685; Willc. 391, pl. 140.

In Regina *v.* Eye (mayor of), 9 A. & E. 676, where the mayor and assessors, under the English Municipal Corporations Act, had expunged the name of the relator from the burgess role, and the relator, at the next term, obtained a rule for a *mandamus* to the mayor (the proper officer under the act) to insert his name, the court made the rule absolute, *directing* the *mandamus to the mayor generally*, notwithstanding that the mayor, who

§ 704. The writ, as we have seen, must be directed to those who are to execute it, or do the thing required, and it must be *delivered to, or served upon*, those who are to make the return.[1] Whether the writ be directed to the corporation or the council,[2] *the service* ought, in our opinion, to be made upon the officers who, under the law, have the power to do the act commanded, and against whom an attachment to enforce obedience should issue.

had expunged the name, had ceased to be mayor before the rule *nisi* was obtained, that no application had been made to the mayor then in office, and that the year to which the burgess list belonged had expired before making the rule absolute. In one case in England, where it was doubtful whether the last mayor had power to hold over, the court ordered that the writ should be directed to the *late mayor*, without specifying his name: Willc. 389, pl. 133.

[1] Rex *v.* Hereford, 2 Salk. 701; Rex *v.* Derby, *ib.* 436; Pees *v.* Leeds, 1 Stra. 640.

[2] *Supra*, Secs. 699–701.

On this subject some decisions have been made in England which seem to be inapplicable, at least in their full extent, to our municipal corporations. Thus, it is held, that where a *mandamus* is directed to the "mayor, &c." the mayor alone can make return, and the other integral parts of the corporation cannot disavow it. The reason assigned is, that the court cannot refuse the mayor's return, he being the principal officer to whom the writ is directed and to whom it is actually delivered, and all the court can do is to compel a return, and if the mayor makes a return contrary to the votes of the majority concerned it is at his peril, and he may be punished by information in the King's Bench: Rex *v.* Abingdon, 2 Salk. 431; *ib.* 699; Stephens' *Nisi Prius*, 23, 26. Accordingly, it has also been held that if the writ be directed to a corporation, it ought to be served upon the mayor: Rex *v.* Exeter, 12 Mod. 251. So, on a *mandamus* to elect a clerk, it was decided that the writ should be delivered to the mayor, as the most visible part of the corporation, notwithstanding the power of election was in the common council: Regina *v.* Chapman, 6 Mod. 152. [See State *v.* Milwaukee, 22 Wis. 396, 397.] In another case it was held that personal service on the town clerk of a peremptory writ to the corporation was sufficient to found an application for an attachment: Rex *v.* Fowey, 4 D. & R. 614. It seems that an attachment may be granted against a mayor, on affidavits that the writ has been left at his house, he having kept out of the way to avoid it: Rex *v.* Tooley, 12 Mod. 312; Willc. 450. At common law *the return* to a writ of *mandamus to a corporation* being an act to be entered of record, it need not be under the seal of the corporation, nor signed by the head or other officer of the corporation, for at common law no officers are obliged to sign their returns: Rex *v.* Exeter, 1 Ld. Raym. 223; Rex *v.* Clarke, 2 *ib.* 848; *ib.* 849; Rex *v.* Wigan, 3 Burr. 1645; Grant on Corp. 63, 228, 229.

The Return, and Subsequent Proceedings.

§ 705. The return to the alternative writ must be made by the corporation, body, officers, or persons to whom the writ is directed; must state facts clearly, positively, and without ambiguity or by way of argument; if it traverses the facts stated in the writ it must deny or answer all that are material, or it may aver, in accordance with the rules of pleading, other facts in avoidance, and such facts "must also be clearly and specifically set forth in the return with sufficient certainty, and not argumentatively, inferentially, or evasively, so that the court may see at once that such facts, if established or admitted, are sufficient as the alternative for obedience to the writ."[1] The return need not be single, but may state several distinct grounds in answer to the writ, and it is enough if any one of them be sufficient, that is, disclose legal reasons why the act commanded by the writ should not be performed.[2]

§ 706. Under the statute of Anne, or similar statutes adopted or enacted in most of the states, or by the course of practice therein, the return, if false in fact, is not conclusive in the *man-*

In this country the *mode of service* is usually prescribed by statute: Haveyreyer *v.* Supervisors, 22 Wis. 396, construing the statute of Wisconsin to require the board of supervisors to be served by leaving the original writ of *mandamus* with the chairman, and a copy with each of the supervisors. In New Jersey, see State *v.* Elkinton, 1 Vroom, 335. Proper mode of making return by county justices or supervisors: Lander *v.* McMillan, 8 Jones (North Car.) Law, 174; McCoy *v.* Harnett, 4 *ib.* 180; People *v.* San Francisco, 27 Cal. 655.

[1] Commonwealth *v.* Allegheny County, 37 Pa. St. 277, 279, 1860, *per Thompson*, J., where the principle is well illustrated and applied: People *v.* Baker, 35 Barb. 105; Willc. 401–409; Loute *v.* Allegheny County, 10 Pittsburg Legal Journal, 241; Pollock *v.* Lawrence, 7 *ib.* 373; Commissioners *v.* Tarver, 21 Ala. 661; Commonwealth *v.* Pittsburg, 34 Pa. St. 496, 1859; Soutter *v.* Madison, 15 Wis. 30; Grant on Corp. 228–240. The mandatory part of the alternative writ, if certain, may be general, but the return must be minute in stating facts, showing why the party did not do the act required: Regina *v.* Southampton, 1 Ellis, B. & S. 5. *Equitable defence* to the demands of the relator, and mode of asserting it: Neuse River Co. *v.* Commissioners, 6 Jones (North Car.) Law, 204.

[2] Rex *v.* Norwich, 2 Ld. Raym. 1244; S. C. 2 Salk. 436; Rex *v.* Pomfret, 10 Mod. 68; Rex *v.* Cambridge, 2 T. R. 461; Rex. *v.* York 6 *ib.* 495; Wright *v.* Fawcett, 4 Burr. 2044.

damus proceeding, and the relator or prosecutor is not driven as at common law to his action on the case for a false return, but may contest the truth of the return.[1] It may be stated to generally true in this country, that upon service of the alternative writ the respondent, or party to whom it is directed, may either: 1, obey the command of the writ and show that fact; or 2, he may object to the writ for defects therein, and move to quash or supersede the same; or 3, he may demur to the writ; or 4, traverse in the return the facts set forth in the writ; or 5, aver in the return other facts by way of confession and avoidance of the facts stated in the writ.[2] And the questions of law and the issues of facts thus presented will be disposed of according to the statutes and the practice of the court.[3]

Peremptory Writ.

§ 707. If the return to the alternative writ be disallowed as insufficient in law, or if the facts averred in the return be found and adjudged untrue, a peremptory writ will be issued, which, as its name implies, requires to be obeyed, and it can not be disobeyed on any grounds which might have been urged in resisting the application for the writ.[4] If the defendants have appeared to a rule or notice of an application for a *mandamus*, and have been heard, and there is no controversy in

[1] Maddox *v.* Graham, 2 Met. (Ky.) 56, 69, 1859; Angell & Ames, Corp, Secs. 727, 728; People *v.* Commissioners, 6 Wend. 559; People *v.* Finger, 24 Barb. 341.

[2] Commonwealth *v.* Allegheny County, 37, Pa. St. 277, 279; Commonwealth *v.* Allegheny County, *ib.* 237, opinion of *Woodward*, J.; Tapping on *Mandamus*, 347; Tarver *v.* Commissioners, 17 Ala. 527; Commonwealth *v.* Lyndall, 2 Brewster (Pa.), 425; *Ib.* 441; Dane *v.* Derby, 54 Maine 95. The Statute of 9 Anne, Chap. XX. is not in force in Alabama: Commissioners *v.* Tarver, 21 Ala. 661. Nor in Maryland: Harwood *v.* Marshall, 10 Md. 451.

[3] Silverthorne *v.* Railroad Company, 33 New Jersey, Law, 173. The prosecutor or relator may demur to the return: *Ib.* Or plead to, and controvert, the facts stated therein: Maddox *v.* Graham, 2 Met. (Ky.) 56, 68, 1859; People *v.* Metropolitan Police Board, 26 N. Y. 316; State *v.* Jones, 10 Iowa, 65; Fowler *v.* Pierce, 2 Cal. 165; 9 Anne, Chap XX. Secs. 1, 2; Grant on Corp. 228–240.

[4] Stevens' Case, T. Raym. 432; Rex. *v.* Norwich, 2 Ld. Raym. 1245; People *v.* Seymour, 6 Cow. 579; Commonwealth *v.* Pittsburg, 34 Pa. St. 496, 1859; Weber *v.* Zimmerman, 23 Md. 45; People *v.* Supervisors, 28 N. Y. 112.

respect to the facts, and the right of the relator is clear, a peremptory writ may, in the discretion of the court, be issued in the first instance.[1] Thus, where a specific duty, *e. g.* the levy of a special tax, required to be performed by public officers at a prescribed time, is omitted to be performed without a reason, or for a reason merely colorable, a peremptory *mandamus*, without a previous alternative, may be issued in the first instance, if the defendants have previously appeared to a notice or rule commanding the duty to be performed *forthwith*.[2]

§ 708. Although the return is insufficient, yet if upon the whole case it clearly appears that the relator is not entitled to the advantage which the peremptory writ would give him, the court will not issue it.[3] If issued, it may, on motion, be set aside, on proof that it was unfairly or improperly obtained, or commands the performance of an illegal act.[4] If when being issued it is not fully and effectually obeyed, the relator may oppose the motion to file the return.[5]

Attachment.

§ 709. Obedience to the peremptory writ is enforced by attaching the persons guilty of the disobedience for contempt.[6] If a corporation makes no return to a writ duly issued and

[1] Knox County *v.* Aspinwall, 24 How. 376, 1860; *Ex parte* Jennings, 6 Cow. 229; *Ex parte* Rogers, 7 Cow. 526; State *v.* Elkinton, 1 Vroom (N. J.), 335; Harkins *v.* Sencerbox, 2 Minn. 344; Justices, &c. *v.* Turpike Company, 11 B. Mon. 143; Board, &c. *v.* Grant, 9 Sm. & Mar. 77. So, if no return be made to an alternative writ, the court, instead of proceeding by attachment, may direct the peremptory writ to issue: State *v.* Jones, 1 Ire. 129; People *v.* Pearson, 3 Scam. (Ill.) 271.

[2] Knox County *v.* Aspinwall, 24 How. (U. S.) 376, 1860.

[3] Willc. 444, pl. 303, citing Rex *v.* Campion, 1 Sid. 14; Rex *v.* Mayor, &c. Cowp. 523; Rex *v.* Griffiths, 5 B. & Ald. 735; *Supra*, Sec. 683.

[4] People *v.* Everett, 1 Caines (N. Y.), 8; Weber *v.* Zimmerman, 23 Md. 45; State *v.* County Judge, 12 Iowa, 237.

[5] Rex *v.* Ipswich, 2 Ld. Raym. 1283.

[6] Commonwealth *v.* Taylor, 36 Pa. St. 263, which contains C. J. *Lowrie's* address on behalf of the Supreme Court of Pennsylvania to the members of the municipal council of Pittsburg, attached for contempt for not levying, as commanded, a tax to pay creditors: Loute *v.* Allegheny County, 10 Pittsburg Legal Journal, 241; Angell & Ames, Sec. 730; Willc. 448.

served, the attachment issues against the individuals guilty of the contempt in their natural capacity.[1] If the writ be directed to several persons in their natural capacities, unless all join in the return, the attachment must go against all, though such as were willing to do the act commanded will not be punished. But where the writ is directed to a corporation by name, the attachment should issue against the guilty only, not against those who do all in their power to obey the command of the writ.[2]

§ 710. The *application for an attachment* is by motion for a rule *nisi*, founded upon affidavits, which gives the defendant an opportunity to show cause.[3] But the rule is here often dispensed with, and upon a clear showing that the writ has been served, and that the disobedience is wilful, or the contempt gross, an attachment may be issued at once.

§ 711. The defendants cannot, on being attached for disobedience to a peremptory *mandamus*, issued by a *federal court*, excuse or justify such disobedience by showing that they have since been enjoined by a *state court* from doing the act commanded by the former court.[4]

[1] Mills' Case, T. Raym. 152.

[2] Bailiffs of Bridgenorth, 2 Stra. 808; Rex *v.* Salop, Bullers' *Nisi Prius*, 198, 201 (*b.*); New Sarum, Comb. 327.

[3] Tidd's Prac. 484; Chaunt *v.* Smart, 1 B. & P. 477. Under the practice at common law, an attachment is not granted for not making a return to the peremptory writ on the day assigned, but it is granted after a peremptory rule to return the writ: Rex *v.* Fowey, 5 D. & R. 614; Coventry's Case, 2 Salk. 429; Willc. 449.

If there has been *no service of the writ* according to law, an attachment for contempt will not be issued: State *v.* Supervisors, &c, 22 Wis. 396, 1867.

If a "town council" to which a *mandamus* is directed adjourn the corporate assembly to prevent a return being made, the members will be punishable for contempt: Regina *v.* Heathcote, 10 Mod. 56.

[4] Riggs *v.* Johnson County, 6 Wall. 166; Lansing *v.* County Treasurer, 1 Dillon, C. C. 522; Supervisors *v.* Durant, 9 Wall. 415; The Mayor *v.* Lord, *ib.* 409. A town treasurer, who has collected the money due a judgment creditor, cannot be compelled by *mandamus* to pay it to the creditor while enjoined at the suit of another: State *v.* Kispert, 21 Wis. 387.

Judgment in Mandamus.

§ 712. A *change in the membership* of a municipal council pending proceedings in *mandamus* against the council does not abate the proceedings; and where such a change occurred, and the new members were made parties, and afterwards a peremptory writ ordered, this was regarded as in effect a judgment against the corporation, and binding upon the councilmen in office at the time of its rendition, and whose duty it was to execute it.[1] But a judgment in *mandamus*, ordering the performance of an official duty, by one who had ceased to be an officer before the judgment was entered, is void, and does not bind his successor if the latter be not made a party to the proceeding and have due notice thereof and opportunity to be heard.[2] Strangers are neither bound, nor estopped, by a peremptory writ of *mandamus*.[3]

[1] Maddox *v.* Graham, 2 Met. (Ky.) 56, 63, 71, 1859; Louisville *v.* McKean, 18 B. Mon. 9, 13, 1857. In the last case, the city of Louisville was held entitled to prosecute an appeal in its name from a proceeding in *mandamus* against the mayor and the members of the council of the city. In thus holding, the court, by *Simpson*, J., remarks: "The act they [the mayor and council] were required to perform was a corporate act. The judgment against them should, therefore, be regarded as having been rendered against them in their corporate character. Indeed, the proceeding should properly have been against the corporation, or against the general council, as that body represented the corporation. If it should be regarded as a proceeding against the mayor and general council individually, the judgment might have been unavailing if they had not been in office at the time it was rendered; and might, therefore, have been made ineffectual by their resignation during the pendency of the motion. But regarding it as a proceeding against the corporation, it would be obligatory on the members of the general council in office at the time of its rendition; and it would not assume the character of a proceeding against individuals, unless it became necessary to issue an attachment for the enforcement of the judgment. Therefore, the appeal is properly prosecuted in the name of the city." In Soutter *v.* Madison, 15 Wis. 30, it was held that if the mayor and part of the council go out of office after the alternative writ is served, their duties devolve on their successors, and that the peremptory writ may be directed to the mayor and council generally.

[2] The Secretary of the Interior *v.* McGarrahan, 9 Wall. 298, 313, 1869. In such a case the officer is treated as the real defendant, and notice to him, actual or constructive, is essential to jurisdiction: *Per Clifford*, J., *ib.* See Regina *v.* Eye (mayor of), 9 A. & E. 676; State *v.* Gates, 22 Wis. 210; Beachy *v.* Lamkin, 1 Idaho, 48; Soutter *v.* Madison, 15 Wis. 30; State *v.* Elkinton, 1 Vroom (N. J.), 335.

[3] Regina *v.* Heathcote, 10 Mod. 56; S. C. Fort. 290; Tapping, 403.

Error and Appeal from Judgment in Mandamus—Supersedeas: State *v.* Judge, &c. 21 La. An. 741; United States *v.* Addison, 22 How. 174; The Secretary *v.* McGarrahan, *supra;* Louisville *v.* McKean, 18 B. Mon. 9, 13; *Supra*, Sec. 703; *Ex parte* Morris, 11 Gratt. (Va.) 292, 1854; Insurance Company *v.* Wheelwright, 7 Wheat. 534; Tapping, 397, 398, and cases cited; Moses, Chap. XXVIII.; Griffin *v.* Steele, 1 Edm. (N. Y.) Sel. Cas. 505; *Ex parte* Milwaukee Railroad Company, 5 Wall. 188; People *v.* Supervisors, 28 N. Y. 112; Chance *v.* Temple, 1 Iowa, 179; State *v.* County Judge, 7 Iowa, 186; Harwood *v.* Marshall, 9 Md. 83; Blackerby *v.* People, 5 Gilm. (Ill.) 266; *Supra*, Sec. 682, note. In England see Act, 6 and 7 Vict. Chap. LXVII. printed in Rawlinson, Corp. Appendix, 730; 15 and 16 Vict. Chap, LXXVI.

CHAPTER XXI.

QUO WARRANTO.

§ 713. In England, the ancient method of proceeding against those who exercised any public franchise without the King's grant, or contrary thereto, was by the writ of *quo warranto*, which is the foundation of the modern, more convenient, and improved remedy, by information in the nature of a *quo warranto*.[1] In the ninth year of the reign of Queen Anne, the famous statute on the subject of *informations* in the nature of a *quo warranto*, in cases of *usurpations or intrusions into the offices and franchises of municipal corporations*, was passed. In substance, this statute has been very generally re-enacted in this country.[2] It may be considered as settled, that where any *public trust or franchise is exercised without authority*, an information will be granted for usurping it, whether it be a prior

[1] Willc. 453; Selwin's *Nisi Prius*, 872; 2 Kyd on Corp. 395; Angell & Ames, Chap. XXI.; Buller's *Nisi Prius*, 210; 3 Blackst. Com. 262; Stephens' *Nisi Prius*, 2429.

[2] People *v.* Thompson, 16 Wend. 655, 1837. The cases in which *quo warranto* lies, and the nature and mode of proceeding, pleading, practice, and judgment will be found discussed, and the authorities collected by the reporter, in a valuable note to The People *v.* Richardson, 4 Cow. (N. Y.) 100–123. *Infra*, Sec. 726. See, also, Stephens' *Nisi Prius*, 2430–2480. In *South Carolina*, the statute of 9 Anne, Chap. XX. is in force, and usurpations by public corporations of unauthorized powers may be tried upon information: State *v.* Charleston, 1 Const. R. 36, 1817; approving, Rex *v.* Mayor of Genterden, 8 Mod. 114. See, also, State *v.* Commissioners, 1 Const. (South Car.) R. 1817, 55, 62. In *Louisiana:* Reynolds *v.* Baldwin, 1 La. An. 162. In *Pennsylvania:* Commonwealth *v.* Jones, 12 Pa. St. 365, 1849; Commonwealth *v.* Central Passenger Railway Company, 52 Pa. St. 506; 9 Anne, Chap. XX. now in force; Commonwealth *v.* Cluley, 56 Pa. St. 270, 1867. In *New York:* People *v.* Utica Insurance Company, 15 Johns. 358; Attorney General *v.* Same, 2 Johns. Ch. 371; 4 Cow. 101, 122, 133. In *Massachusetts:* Goddard *v.* Smithett, 3 Gray, 116. In *New Jersey:* State *v.* Turnpike Company, 1 N. J. 9; State *v.* Tolan, 33 N. J. (Law) 195, 1868. In *Iowa:* Cochran *v.* McCleary, 22 Iowa, 75, 1867. In *Ohio:* State *v.* Cincinnati Gas Company, 18 Ohio St. 262. In *Maine:* 9 Anne, Chap. 20, not in force; Dane *v.* Derby, 54 Maine, 95, 1866. Practice in that state: *Ib.*

franchise of the crown or one exercised under an act of parliament. Thus, where by private act of parliament for enlarging and regulating a port, several persons were appointed trustees, and a particular method of filling vacancies was prescribed, and the defendants took upon themselves to act as trustees without such an election as the statute required, leave was given to file an information in the nature of a *quo warranto* against them.[1]

§ 714. Under the legislation and practice in the different states in this country, an information in the nature of a *quo warranto* is the appropriate remedy both for the usurpation of *municipal and other public offices*, and for the usurpation of a *public franchise*.[2] Thus this remedy will lie to test the right of a member of a city council to a seat in that body,[3] or to test the right of a person to preside over or to vote in a meeting of a municipal body.[4] In such cases, *ordinarily*, equity has no jurisdiction.[5]

[1] Rex *v.* Nicholson, 1 Stra. 299; see, also, Rex *v.* Bedford, 1 Barnard. 242, 280; People *v.* Utica Insurance Company, 15 Johns. 358, 388, 1818; Buller's *Nisi Prius*, 210. Various instances in which *quo warranto* informations, in England, have been exhibited against a corporate officer, to show by what authority he held a franchise which he assumed to exercise in his official capacity, are collected and stated in 3 Stephens' *Nisi Prius*, 2442, 2443.

[2] Reynolds *v.* Baldwin, 1 La. An. 162, 1846; followed, Cochran *v.* McCleary, 22 Iowa, 75, 1867. *Ante*, p. 241, Secs. 210, 213, and cases cited, Sec. 680; Rex *v.* Williams, 1 Burr. 407; S. C. 2 Kenyon, 75; State *v.* Deliesseline, 1 McCord (South Car.) 52, 1821.

[3] Commonwealth *v.* Meeser, 44 Pa. St. 341; S. C. Brightley's Election Cases, 659.

[4] Reynolds *v.* Baldwin, 1 La. An. 162, 1846; Cochran *v.* McCleary, 22 Iowa, 75, 1867. *Ante*, p. 241, Sec. 210.

[5] *Ante*, p. 241, Sec. 210. But see, *ante*, p. 243, Sec. 213; People *v.* Galesburg, 48 Ill. 485, 1868; Markle *v.* Wright, 13 Ind. 548, 1859; Hagner *v.* Heyberger, 7 Watts & Serg. 104, 1844.

The holding of an election will not be enjoined, since *quo warranto* is a complete remedy: People *v.* Galesburg, 48 Ill. 485, 1868. Where the remedy at law is inadequate, a Court of Equity may, for that reason, take jurisdiction: *Ib. obiter*. *Ante*, Sec. 213. The governor will not be restrained from granting a commission to an officer who has been improperly elected, any more than the courts would restrain the legislature from passing an unconstitutional act: Grier *v.* Taylor, Governor, 4 McCord (South Car.), 206, 1827, *per Bay*, J.; Chicago *v.* Evans, 24 Ill. 52, 1860; Smith *v.* McCarthy, 56 Pa. St. 359.

§ 715. In a previous chapter we have had occasion to consider when statutes providing special proceedings with respect to *municipal elections* will or will not be held to oust *the revisory or superintending jurisdiction of the Superior Courts* over such proceedings and elections, and we may here repeat that this salutary jurisdiction should not be deemed to be taken away, except in cases where the legislative intent to this effect is plainly manifest.[1]

§ 716. We have before seen that it is the doctrine of the English law, quite generally adopted in this country, that where *a person is in the actual possession of an office under an election or a commission*, and is thus exercising its duties *under color of right*, that the validity of his election or commission cannot, in general, be tried or tested on a *mandamus* to admit another, but only by an information in the nature of a *quo warranto*.[2] The certificate of election of an officer, or his commission, coming from the proper source, is *prima facie* evidence in favor

[1] *Ante*, p. 179, Sec. 139, *et seq.*

The cases discover some conflict of opinion in respect to when a special mode of contesting elections will exclude the mode by *quo warranto*. See, on this subject, State *v.* Marlow, 15 Ohio St. 114, 1864; Commonwealth *v.* Garrigues, 28 Pa. St. 9; Commonwealth *v.* Baxter, 35 Pa. St. 263; Commonwealth *v.* Leech, 44 Pa. St. 332; Commonwealth *v.* Meeser, 44 Pa. St. 341; S. C. Brightley's Election Cases, 659, 663, which the learned editor of the volume last cited regards as in conflict with the Commonwealth *v.* McCloskey, 2 Rawle (Pa.), 369, two judges dissenting; approved, People *v.* Holden, 28 Cal. 123. *Ante*, Secs. 141, 142, 143, 144; Steele *v.* Martin, 6 Kansas, 430. *Post*, Sec. 740.

[2] *Ante*, Sec. 141 and note; Secs. 674, 678–682; Regina *v.* Leeds, 11 A. & E. 512; Regina *v.* Derby, 7 A & E. 419; Ohio *v.* Moffitt, 5 Ohio, 358; State *v.* Choate, 11 Ohio, 511; State *v.* Bryce, 7 Ohio, part 2, p. 82; People *v.* New York, 3 Johns. Cas. 79, 1802 (*mandamus* to admit aldermen). In the case last cited, the *reason for the rule* is thus stated by the court: "Where the office is already filled by a person who has been admitted and sworn, and is in by color of right, a *mandamus* is never issued to admit another person; because the corporation, being a third party, may admit or not, at pleasure, and the rights of the party in office may be injured, without his having an opportunity to make defence. The proper remedy, in the first instance, is by information in the nature of a *quo warranto*, by which the rights of the parties may be tried:" 3 Johns. Cas. 79, 80. See, also, People *v.* Sweeting, 2 Johns. 184; People *v.* Van Slyck, 4 Cow. 297, 323; Stephens' *Nisi Prius*, 2445, *et seq.* where the validity and invalidity of corporate elections are fully treated.

of the holder, and in every proceeding, except a direct one to try the title of such holder, it is conclusive; but in *quo warranto* the court will go behind the certificate or commission, and inquire into the validity of the election or appointment, and decide the legal rights of the parties upon full investigation.[1]

§ 717. In a proceeding by information in the nature of a *quo warranto* the defendant must either disclaim or justify. If he disclaims, the people are at once entitled to judgment. If he justifies, he must set out his title specifically. It is not enough to allege generally that he was duly elected or appointed to the office. He must plead facts, showing on the face of the plea that he has a valid title to the office. The people or state is not bound to show anything. Therefore, it is no answer to the information that the relator is not entitled to the office. The defendant is called upon to show by what

[1] People *v.* Van Slyck, 4 Cowen, 297, 1825; People *v.* Vail, 20 Wend. 12, 1838; People *v.* Richardson, 4 Cow. 100, 101, note; *ib.* 297; People *v.* Seaman, 5 Denio, 409, 1848; State *v.* Marston, 6 Kansas, 524, 1870; Low *v.* Towns, Governor, &c. 8 Geo. 360, 1850; Pitts *v.* Bonner, 7 *ib.* 449. *Ante*, Sec. 141 and note; Secs. 143, 144, 160, 682.

In the People *v.* Van Slyck, *supra*, which was an information in the nature of a *quo warranto* against one intruding into an office by reason of an unlawful decision of the board of canvassers, *Woodworth*, J., said: "It was contended on the argument that the decision of the board of canvassers was conclusive until reversed, *and could only be reviewed by certiorari.* [See, *post*, Chap. XXII. Sec. 739; *ante*, Sec. 141.] This objection cannot prevail. They are required by the act to attend at the clerk's office, and calculate and ascertain the whole number of votes given at any election, and certify the same to be a true canvass. This is not a judicial act, but merely ministerial. They have no power to controvert the votes of the electors. If they deviate from the directions of the statute, and certify in favor of an officer not duly elected, he is liable to be ousted on an information in the nature of a *quo warranto* where the trial is had upon the right of the party holding the office. The court will decide, upon an examination of all the facts:" 4 Cow. 297, 323.

Effect of choosing or electing a *disqualified* person: *Ante*, p. 176, Sec. 135; Commonwealth *v.* Cluley, 56 Pa. St. 270, 1867; Stephens' *Nisi Prius*, 2454.

Acts of officers *de facto* are valid, unless *directly* questioned by proceedings against *them*: Burke *v.* Elliott, 1 Ire. Law, 355; Burton *v.* Patton, 2 Jones (North Car.), Law, 124. Difference between *de facto* and *de jure* officers is well stated by *Ruffin*, C. J.: *Ib.* Stephens' *Nisi Prius*, 2448. See, also, *ante*, Sec. 160, note; Secs. 211, 212, 214; State *v.* Tolan, 33 N. J. Law, 195, 1868.

warrant he exercises the functions of the office; he must exhibit good authority, or the state is entitled to a judgment of ouster.[1]

§ 718. In England it was held, in Rex *v.* Saunders (in which an information in the nature of a *quo warranto* was moved against the defendant, to show by what authority he claimed to be an alderman of Taunton), where the relator showed that the corporation was dissolved and extinct, and that no corporate body in fact existed, or claimed to exist, at the time of the application, that the information should be refused.[2] This case was referred to in South Carolina, and the opinion expressed that *quo warranto* would not lie against one claiming office under a private corporation which has no legal existence.[3]

[1] Clark *v.* People, 15 Ill. 213, 1853; Cole on Crim. Inf. 210, 212; Willc. 486, 487, 488, where the requisites of pleas are stated; Angell & Ames on Corp. Sec. 756; Stephens' *Nisi Prius*, 2431, 2464; 2 Kyd, 399. It is not sufficient for the defendant to aver that he is "duly elected:" Commonwealth *v.* Gill, 3 Whart. (Pa.) 228.

[2] Rex *v.* Saunders, 3 East, 119, 1802. In this case the relator, in 1802, stated that the defendant had been elected alderman in 1788, and that the corporation was dissolved in 1792, since which no acts had been attempted to be done by the corporate body, but that the defendant had made his appearance at Taunton at the last election for members of parliament, and had there claimed, as alderman, to be returning officer, and had received votes as such, and had executed a separate return. Lord *Ellenborough*, C. J., delivering the judgment of the court, observed that "the corporation being stated to be actually dissolved, and no corporate body claiming to be such, in existence, the act of this individual person was a mere nullity, and of no more effect than if a mere stranger had come into the town and claimed to be an alderman and returning officer. Here are no civil rights in controversy, which would warrant the court to interfere by their own authority; but what he claimed was a mere nullity; there was no such office in existence, and therefore no ground for our interference," and the rule was refused.

[3] State *v.* Lehre, 7 Rich. (South Car.) Law, 234, 324, 1854, *per Glover*, J., who said: "It was contended, in argument, that there was no corporation, and that the election [for bank directors and president] is therefore void. If no corporation exist, it would be nugatory and fruitless to proceed any further in the *quo warranto*, and call in question a harmless and pretended claim, where no civil right is in controversy. If there was no such corporation, there was no such officer, and would be as was said by Lord *Ellenborough*, in Rex *v.* Saunders (3 East, 119), as if a stranger had come into town and claimed to be president or director."

In New York, however, it is expressly decided that *the question whether a municipal or public corporation has been legally created or erected*, may be tested in an action or proceeding in the nature of *quo warranto* brought against any one exercising an office in such corporation.[1]

§ 719. It is held, in England, that if the information be for using a franchise by a corporation it should be *against the corporation;* but if for usurping to be a corporation, it should be *against the particular persons* guilty of the usurpation.[2] In Ohio, under the statutes of the state, the proceeding to question the franchise of being a private corporation must be against the individuals who usurp the franchise; and an information in the nature of *quo warranto* will not lie against a *de facto* corporation, in its assumed corporate name, to compel it to show by what title it exercises the franchise to be a corporation;

[1] People *v.* Carpenter, 24 N. Y. 86, 1861. This action was in the nature of *quo warranto* in the name of the people, and was brought to test the right of the defendant to exercise the duties and powers of supervisors of the town of Afton, and the case turned upon the sole point whether that town had been legally created. It was contended in argument that *this form of action* was not the appropriate remedy to bring up for deciding that point. Defendant's argument was, that if there was, as the plaintiffs allege, no such town as Afton, then it was impossible that the defendant should exercise the duties of an office which had no existence. "But," says *Davies*, J., "we think the objection too technical. The object of the framers of the code, or the provisions in reference to these actions, manifestly was to provide a speedy and effective mode of determining the claims of persons to exercise the duties of any office within this state, and this necessarily involves the determination of the existence of the particular office." See, also, where same view was taken, *The People* v. *Draper*, 15 N. Y. 532, an action of like character, to test right of the defendants to the office of police commissioners under the metropolitan police district act. And see note in 4 Cow. 100 *et seq.*

In Massachusetts, it was held that where a new county had been created by an act of the legislature which contained a provision that it should not take effect until a future day mentioned, that an appointment by the governor to an office for such county, before the act took effect was void, and that an information in the nature of a *quo warranto* would lie to remove the appointee: Commonwealth *v.* Fowler, 10 Mass. 290, 1813. S. C. 11 *ib.* 339.

[2] Rex *v.* Cusack, 2 Roll. R. 113, 115; 4 Cow. 109, note. See Mr. *Willcock's* observations; Willc. 500, pl. 488.

the court admitted, however, that in such cases municipal corporations might be an exception, but the point was not decided.[1]

§ 720. In no instance have the courts of this country declared *forfeited the charter or franchises* of a municipal corporation *for the acts or misconduct of its agents or officers.* That this was done by the English courts prior to the revolution of 1688 is well known. The case of the city of London is the most conspicuous historical example. It is believed that such a remedy is not applicable to our corporations, created, as they are, by statute, for the benefit not of the officers or a few persons, but of the whole body of the inhabitants residing therein and the public. If the officers usurp rights which belong to the state, the law, by injunction, by action, by declaring their acts void, and in other ways, can correct the usurpation, and should do it, without forfeiting the rights and franchises of the citizens who are blameless.[2]

[1] State *v.* Cincinnati Gas Company, 18 Ohio St. 262; Commonwealth *v.* Central Passenger Railway, 52 Pa. St. 506. *Scott*, J., in the first case, says this question was left open in the City of London's Case, 8 How. St. T. 1039, and seems to have been decided otherwise in Rex *v.* Chester, cited 2 Term R. 565, but that in this country the weight of authority is otherwise: People *v.* Railroad Company, 15 Wend. 114; People *v.* Richardson, 4 Cow. 97, 109, note; Angell & Ames, Sec. 756. And he admits that municipal corporations may be an exception, because the inhabitants of the place may be so numerous that it would be impossible to proceed against them individually.

Judgment in *quo warranto* against a municipal corporation and officers therein acting under a charter which had not legally been accepted by reason of fraudulent voting: State *v.* Bradford, 32 Vt. (3 Shaw) 50. Acceptance of charter: *Ante*, p. 63, Sec. 23.

[2] See, on this subject, Commonwealth *v.* Pittsburg, 14 Pa. St. 177, 1850. *Ante*, Chap. VII. on the Dissolution of Municipal Corporations, Secs. 109, 110, 111, 112; City of London's Case, *ante*, p. 14.

A municipal corporation cannot, in any collateral proceeding, be declared or held to have forfeited its charter for non-user or other cause; it retains its corporate character until it is repealed or the forfeiture declared by direct judicial proceeding: Harris *v.* Nesbit, 24 Ala. 398, 1854 (ferry controversy). Under the code of Alabama, an information in the nature of a *quo warranto* will not lie to vacate the charter of a municipal corporation on account of the passage of unauthorized ordinances by the council: State, &c. *v.* Town Council, 30 Ala. 66, 1857.

§ 721. We have elsewhere treated of the mode in which illegal corporate acts may be prevented, and the remedies afforded by the law in respect thereto;[1] but it may be here observed that an information in the nature of a *quo warranto may*, in proper cases, *be resorted to as a remedy for the illegal usurpation*, by a municipal corporation, *of the powers not granted* to it by its charter or the law. Thus, in South Carolina, it has been adjudged that the right of a municipal corporation to exercise public powers, as, for example, its right under its charter to tax certain descriptions of property, may be determined on an information in the nature of a *quo warranto*, filed by the attorney general against the corporation.[2]

§ 722. In proceedings in the nature of *quo warranto*, the rule to show cause is not grantable, of course, but depends upon the *sound discretion of the court.* It will not be granted in all cases, though the incumbent be ineligible and the relator have sufficient interest to prosecute; the court will look at the relator's motive and the public good in the exercise of the discretion confided to it.[3] Accordingly, a rule was refused against

[1] *Post*, Chap. XXII. XXIII.

[2] State *v.* Charleston, 1 Const. R. 36, 1817; Buller's *Nisi Prius*, 212. See in Iowa, State *v.* Lyons, 31 Iowa, 432, 1871, where the nature of the remedy was discussed, and it was held that proceedings in *quo warranto* will not be entertained for the purpose of *annulling a city ordinance* passed in the irregular and improper exercise of a power conferred by law.

Quo warranto will not lie against a corporation for taking land without making compensation as required by law — trespass is the remedy: People *v.* Hillsdale, &c. Company, 2 Johns. 190, 1807. As to remedy: See chapter on *Mandamus, ante.*

Simple error of judgment on the part of officers of municipal corporations as to the extent of their powers, will not authorize the court, on *quo warranto*, to declare a forfeiture of their offices: State *v.* Town Council, 30 Ala. 66, 1857.

[3] Commonwealth *v.* Jones, 12 Pa. St. 365, 1849; Commonwealth *v.* Cluley, 56 Pa. St. 270, 1867; Rex *v.* Parry, 6 Ad. & El. 810; 2 N. & P. 414; Rex *v.* Brown, 3 Term R. 574; Rex *v.* Wardroper, 4 Burr. 1964; Rex *v.* Dawes, *ib.* 2022; Rex *v.* Sargeant, 5 Term R. 567.

Who may be a relator, and what will constitute a sufficient interest to give a private relator the writ in a case of public right, or to test the right to a public or municipal office: Commonweath *v.* Cluley, 56 Pa. St. 270; S. C. Pitts. L. J. February 3, 1868, and cases cited, as to right of *defeated candidate* to bring *quo warranto* against the successful candidate; Commonwealth *v.*

the defendant, the acting mayor, where it appeared there was no adverse claimant to the office.[1] So the court refused to allow an information in the nature of a *quo warranto* where the election day was suffered to lapse, and the election was held in good faith on the wrong day.[2]

§ 723. In England there is a discretion in the court to grant an information in the nature of a *quo warranto* although the case cannot be tried until *the term of the officer is at an end*, satisfactory reasons for the delay being given; and it has even been granted though the office be determined at the time the application for the information is made.[3] In this country the authorities are conflicting. In some of the states it has been held that an information will not be granted when it is not possible to enter a judgment before the term of the officer proceeded against expires. In other cases it has been adjudged, and we think correctly, that *quo warranto* may be properly

Jones, 12 Pa. St. 365, 1849; Commonwealth *v.* Meeser, 44 Pa. St. 341, 1863; S. C. Brightley's Election Cases, 659, and note, and cases cited. See, also, as to interest of relator, Brightley's Election Cases, 146, 289, 664; Eaton *v.* State, 7 Blackf. 65, 1843; State *v.* Schnierie, 5 Rich. (Law) 299, 1852. Must be in the name of the attorney general: *Ib.* *A voter* in a city was held to have a sufficient interest in the due election of members of the city council to become the relator in *quo warranto* against persons exercising the duties of councilmen: State *v.* Tolan, 33 N. J. (Law) 195, 1868.

See, also, *as to relator:* Rex *v.* Hodge, 2 B. & A. 344; Rex *v.* Parry, 6 A. & E. 810; Rex *v.* Quayle, 11 A. & E. 508; Rex *v.* Ogden, 10 B. &. C. 210; Rex *v.* Marten, 4 Burr. 2120; Rex *v.* Trevenen, 2 B. & A. 482; Rex *v.* Slythe, 6 B. C. 242; Regina *v.* Anderson, 2 Q. B. 740; Regina *v.* Greene, 2 Q. B. 460. See Rule of Queen's Bench of November 8, 1839, 11 A. & E. 2; Rawlinson on Corp. (5th ed.) 359, 360; Willc. 476; Stephens' *Nisi Prius*, 2433.

[1] State *v.* Schnierie, 5 Rich. (South Car.) Law, 299, 1852.

[2] State *v.* Tolan, 33 N. J. (Law) 195, 1868. The requirement to give *notice of the regular annual election*, of which the time is fixed by charter, is directory; People *v.* Hartwell, 12 Mich. 508, 1864; People *v.* Witherell, 14 Mich. 48. *Ante*, Sec. 136; Secs. 156–160; Sec. 675; Stephens' *Nisi Prius*, 2446, 2447.

[3] Rex *v.* Williams, 1 W. Black. 95; Rex *v.* New Radnor, 2 Ld. Kenyon's Notes, 498; Rex *v.* Harris, 6 Ad. & El. 475 (33 Eng. C. L. 117); Rex *v* Powell, Sayer, 239; Rex *v.* Warlow, 2 M. & S. 76; Rex *v.* Payne, 2 Chitty, 367; Angell & Ames, Sec. 744. Present state of legislation and adjudications in England on the effect of delay in commencing proceedings: Rawlinson on Corp. (5th Ed.) 357; Stephens' *Nisi Prius*, 2432.

brought during the official term of the officer, and if so brought, that it may be tried, and the proper judgment entered afterwards. In North Carolina the doctrine of the English courts above mentioned has been followed, and it has not been considered absolutely necessary that the information should be applied for while the defendant is continuing to hold the office. The cases on this subject are referred to in the note.[1]

§ 724. Under the statute of 9 Anne, Chap. XX. Sec. 4, reenacted in many of the states literally or in substance, it is settled that there must be some *act* of usurpation — a *user* or *possession* of the office or franchise — to authorize an information in the nature of a *quo warranto*. It is not sufficient to allege *merely* that the defendant *claims* to use or exercise the office or franchise.[2]

[1] "The resignation of the incumbent, or even the termination of his office, will not prevent the information being prosecuted to a final judgment, if the proceedings were commenced prior to the resignation, or the expiration of the term:" *Per Wagner*, C. J., Hunter *v.* Chandler, 45 Mo. 452, 1870; S. C. 10 Am. Law Reg. (N. S.) 440; S. P. Commonwealth *v.* Smith, 45 Pa. St. 59; People *v.* Hartwell, 12 Mich. 508, 1864. But in *Georgia* it is held that the title to an office will not be tried on *quo warranto*, when at the time of trial the term of office is expired, and no judgment of *ouster* can be rendered: Morris *v.* Underwood, 19 Ga. 559, 1856. In *Massachusetts* an information was refused, for reasons partly peculiar, where the office was annual, and there could be no determination during the year: Commonwealth *v.* Althearn, 3 Mass. 285, 1807; Howard *v.* Gage, 6 Mass. 462. See, also, People *v.* Sweeting, 2 Johns. 184; State *v.* Jacobs, 17 Ohio, 143. Compare People *v.* Loomis, 8 Wend. 396, 1832.

Following the decisions in England, it has been held that an information in the nature of a *quo warranto* may, in certain cases, be filed against public officers after the expiration of their office, or against special commissioners after they have acted: Burton *v.* Patton, 2 Jones (North Car.), Law, 124, 1854. In the King *v.* Williams, 1 W. Black. 93, there was a judgment of ouster, although the usurpation (for unlawfully holding a court in the corporation of Denbigh) was not continued to the trial, Lord *Mansfield* observing, "judgment of ouster must be given, lest the defendant repeat the act:" *Ib.* 95.

Effect of acquiescence and lapse of time on the remedy by quo warranto: People *v.* Oakland Bank, 1 Doug. (Mich.) 285; People *v.* Pontiac Bank, 12 Mich. 527; State *v.* Turnpike Company, 8 Rh. Is. 521; State *v.* Cincinnati Gas Company, 18 Ohio St. 285, 1868; Angell & Ames, Corp. Sec. 743.

[2] Rex *v.* Ponsonby, 1 Vesey, 1, leading case, where defendants were charged with usurping a municipal office, cited and approved and followed by Supreme Court of New York, in The People *v.* Thompson, 16 Wend.

§ 725. The *judgment of ouster on quo warranto*, until reversed conclusively and finally, determines the right as to all persons whomsoever; and it may be given in evidence by the parties and others, without being pleaded, on an issue involving the rights upon which it has passed.[1]

§ 726. It does not belong to a work of this character to treat of the *practice* in proceedings in informations in the nature of a *quo warranto*. This is regulated, to a considerable extent, by the statutes of the different states, which modify, and render more simple, speedy, and effectual, the common law modes of procedure. But the nature of the remedy, and the principles which govern it, remain substantially as at common law, as amended by remedial acts of parliament; and the practice, as near as practicable, is the same as in the King's Bench, except when altered by the legislation of the particular state.[2] It must suffice to refer the reader to sources of information on this subject.[3]

655, 1837. See, also, Rex *v.* Whitwell, 5 T. R. 86; Buller's *Nisi Prius*, 211; Willc. on Mun. Corp. 462, pl. 254, *et seq.;* Angell & Ames, Corp. Sec. 744; Stephens' *Nisi Prius*, 2457. The statute of Anne commences, "If any person or persons shall usurp, or intrude into, or unlawfully hold and execute, the offices of," &c.

[1] Utica Insurance Company *v.* Scott, 8 Cow. 708, 721, 1826, *per Colden*, Senator, and authorities there digested. In Missouri, see Hunter *v.* Chandler, 45 Mo. 452. A former judgment on an individual relation in *quo warranto* by the *district* attorney was held to be no bar to a public proceeding by the attorney general: State *v.* Cincinnati Gas Company, 18 Ohio St. 285, 1868. And a decree of a federal court enjoining a party from obeying an ordinance does not affect the right of the state, not a party to that proceeding, to proceed by *quo warranto* to assert the validity of the ordinance. *Ib.*

[2] Commonwealth *v.* Jones, 12 Pa. St. 365, 1849, where the practice under the act of 1836 is stated. Former practice no longer obtains under code of New York: People *v.* Conover, 6 Abb. Pr. R. 220.

[3] Willc. 453, *et seq.;* Angell & Ames, Chap. XXI.; 3 Black. Com. 262; Buller's *Nisi Prius*, 210; Stephens' *Nisi Prius*, 2460, 2429, *et seq. Rule to show cause:* Commonwealth *v.* Jones, 12 Pa. St. 365. When dispensed with: State *v.* Gummersall, 4 Zabr. (N. J.) 529, 1854.

Process upon filing information: Willc. 264; Commonwealth *v.* Smead, 11 Mass. 74; State *v.* Gummersall, 4 Zabr. (N. J.) 529, 1854. *Forms of Information — Pleas and Replication in Proceedings by Quo Warranto:* People *v.* Bank of Niagara, 6 Cow. 196, approving precedent used in the celebrated case against the city of London (3 Hargr. St. Tr. 545), and in Rex *v.* Amery

(2 T. Rep. 515). For further forms, see learned and valuable note to the People *v.* Richardson, 4 Cow. (N. Y.) 106, *et seq.* and authorities there cited; People *v.* Van Slyck, 4 Cow. 297. See, also, Eaton *v.* State, 7 Blackf. (Ind.) 65, 1843. *Form of Verdict:* Thompson *v.* People, 23 Wend. 537, reversing S. C. 21 Wend. 235. *Form of Judgment of Ouster:* 2 Kyd on Corp. 407; 8 Cow. 721; Commonwealth *v.* Fowler, 10 Mass. 290, 1813; S. C. 11 *ib.* 339, where the form of judgment is given. See, also, as to form of judgment: Miner's Bank *v.* United States, 5 How. (U. S.) 213, 1847. If relators are successful, they are entitled to *costs*, and hence are entitled to a judgment of ouster, although the term of the office in question has expired: People *v.* Loomis, 8 Wend. 396, 1832. *Contra*, State *v.* Jacobs, 17 Ohio, 143. And see Angell & Ames on Corp. Sec. 745. *Supra*, Sec. 723. Judgment, under statute, of ouster against the defendant without passing upon the plaintiff's right: Gano *v.* State, 10 Ohio St. 237.

The refusal of the court to allow a claimant to a public office to file an information is a *final judgment*, reviewable on error, and this, notwithstanding the court has a discretion in granting or refusing leave; State *v.* Burnett, 2 Ala. 140, 1841; Ethridge *v.* Hill, 7 Port. (Ala.) 47.

CHAPTER XXII.

Remedies to Prevent, Correct, and Redress Illegal Corporate Acts.

This subject will be considered in the following order:—

1. Of the Remedy in *Equity*—Secs. 727–738.
2. Of the Remedy by *Certiorari*—Secs. 739–743.
3. Of the Remedy by *Prohibition*—Sec. 744.
4. Of the Remedy by *Indictment*—Secs. 745–748.

The remedy by *private action* is treated in the next chapter.

Remedy in Equity.

§ 727. Equity will sometimes interfere to prevent the municipal authorities from making an illegal use of their powers, and relieve against their illegal acts; but on a principle well known to our jurisprudence, there should be some reason to justify a resort to this tribunal, such as the want of an adequate remedy at law, irreparable injury, breach of trust, or the like. Usually, the question whether municipal and public corporations are acting, or have acted, within the limits of the authority which the law confers upon them, involves an examination of purely legal principles, unmixed with equity. Therefore, in general, the court of chancery has no jurisdiction to restrain, review, or set aside, even if irregular or illegal, the proceedings of such a corporation. This jurisdiction belongs, except in special cases, which will be mentioned, to the supervisory power and control of the common law courts.[1]

[1] Mayor, &c. of Brooklyn *v.* Meserole, 26 Wend. 132, 1841, *per Nelson*, C. J., who admits of only two classes of such cases in which equity has jurisdiction,—1, Irreparable injury; and 2, Multiplicity of suits,—and approves Mooers *v.* Smedley, 6 Johns. Ch. 28. See, also, Heywood *v.* Buffalo, 14 N. Y. 534, 1856; Bank *v.* Supervisors, 25 N. Y. 312; Dows *v.* Chicago, 11 Wall. 108, 1870. In the *federal courts* it is well known there can be no case of equitable cognizance where there is a plain and adequate remedy at law: *Ib.* Ewing *v.* St. Louis, 5 Wall. 413, 1866, citing with approval, Mayor, &c. *v.* Meserole, and Heywood *v.* Buffalo, above-mentioned. *Ante*, Sec. 476, and note.

§ 728. But since these corporations hold their powers in trust for the public benefit, and since the remedy by injunction or by bill in equity is often more efficacious than any other to restrain and correct municipal abuses, the spirit of the later cases is to favor a relaxation, rather than a strict application of the rule adverted to, which denies the right to go into equity if there be a plain and full remedy at law. The state of the law, as moulded by the courts, on the subject of relief against illegal corporate acts, threatened or consummated, can be most satisfactorily ascertained by a general survey of the field of adjudication. Generally speaking, equity will interfere in favor of, or against, muncipal corporations, on the same principles by which it is guided in other cases.[1] For the rea-

So, in New Jersey, by a long established practice, *courts of law* are regarded as the proper tribunal to review the irregularities or errors in the acts and proceedings of municipal corporations; but under certain circumstances, equity will entertain jurisdiction for like purposes: Morris Canal Company *v.* Jersey city, 1 Beasley (N. J.) 252, 1859; State *v.* Jersey city, 5 Dutch. 441; Carron *v.* Martin, 2 Dutch. 594, 1857; State *v.* Newark, 1 *ib.* 399; Holmes *v.* Jersey City, 1 Beasl. 299; Attorney General *v.* Patterson, 1 Stock. (N. J.) 624; State *v.* Jersey City, 1 Vroom. 521; *Ib.* 247; Bond *v.* Newark, 19 N. J. Eq. 376; Cross *v.* Morristown, 18 *ib.* 305. *Infra*, Sec. 741. See, also, Gartside *v.* East St. Louis, 43 Ill. 47; Oakland *v.* Carpentier, 13 Cal. 540, 643; Intendant *v.* Pippin, 31 Ala. 542, 551, *per Stone*, J.; Baltimore *v.* Railroad Company, 21 Md. 50, 1863.

As to relief in equity against *forfeitures* under municipal ordinances, see Chap. XII. *ante*, Sec. 286; Chap. XV. Sec. 449. Jurisdiction and relief in equity, see Index — *Equity*; 2 Spence Eq. Jurisd. 32.

Injunction — when granted in matters concerning *municipal elections:* Brightley's Election Cases, 623, 573. And see chapters on Municipal Officers and *Mandamus*, *ante*; Index, *Injunction*. Right of county, or the body which represents it, to file bill in Chancery to restrain an *illegal appropriation of a public highway:* Justices, &c. *v.* Plankroad Company, 9 Ga. 475; and compare 15 Ga. 39. See, *ante*, Chaps. on Dedication and Streets; Index: *Equity, Injunction.*

The subjects of *Mandamus* (*ante*, Chap. XX.), and *Quo Warranto* (*ante*, Chap. XXI.), are separately treated.

[1] Attorney General *v.* Corporation of Plymouth, 9 Beav. 67. Accordingly, it was held where the owner conveyed property to a city for a public way, in the confidence of receiving compensation, which the corporation failed to make, that he was entitled to relief: Walker *v.* City Council, 1 Bailey (South Car.), Eq. 443, 1831.

Bill by corporation to set aside *fraudulent grant* by its council: Oakland *v.* Carpentier, 13 Cal. 540. See S. C. subsequently reported. See, also, O'Brien County *v.* Brown, 1 Dillon, C. C. R. 588, bill to set aside fraudulent

son that these corporations are intrusted for defined objects, or for public purposes with large powers, the courts have evinced some anxiety not to allow their authority to be used to oppress the inhabitants in their jurisdiction; and it may safely be affirmed that there is a remedy, either in equity or by *certiorari*, prohibition, appeal, indictment, civil action, or in some other way, for all abuses of power and all invasions of the legal rights of the citizens subjected to municipal control. There can, at least ordinarily, be no judicial restraint or interference with the *bona fide* exercise of powers, legislative or discretionary in their nature, and which do not violate private rights.[1] We have had occasion already, to some extent, to state, in connection with special topics discussed, in what cases, and in what mode, corporate acts and proceedings may be judicially examined or reviewed,[2] but the subject is of sufficient importance to require some further separate consideration.

judgment. It seems that a municipal corporation, in its corporate character, where the alleged illegal action is not aimed at and cannot affect the *corporate* rights or *corporate* property, cannot maintain an action to restrain or to be relieved against the levy of an illegal tax upon the tax-payers, as where the board of supervisors of the *county* are proceeding to levy and collect an illegal tax upon the taxable property of the citizens of one of the *towns* in the county: Guilford *v.* Supervisors, 13 N. Y. 143, 1855, *per Denio*, J., who says: "The principles affirmed in this court by Lorillard *v.* Town of Monroe, 1 Kern. 392, seem to me, hostile to this action." And see subsequent cases of Doolittle *v.* Supervisors, &c. 18 N. Y. 155, and Roosevelt *v.* Draper, 23 *ib.* 318, below-mentioned. *Infra*, Sec. 735.

Where the *mayor* is invested with the power of seeing that the charter of the corporation is faithfully executed, this is a duty with which he is entrusted for the common benefit of all the corporators, and gives him the right to select the means best calculated to discharge it, and in the exercise of this right he may, according to the liberal, but somewhat questionable, view of the Supreme Court of Louisiana, in his official name and capacity, *bring suit* to test the legality of the ordinances and to restrain the aldermen or officers of the corporation from issuing warrants or doing acts in violation of the laws of the state or the charter of the city: Genois, Mayor, &c. *v.* Lockett, 13 La. 545. 1838.

[1] *Ante*, p. 106, Sec. 58; *Infra*, Sec. 741; Hamerick *v.* Rouse (county seat removal), 17 Ga. 56, 1855; State *v.* Woody, *ib.* 612. *Post*, Chap. XXIII.

[2] *Ante*, p. 180, Sec. 141; p. 243, Sec. 213; p. 273, note; p. 361, Sec. 368, and note; p. 458, Sec. 476. *Ante*, Sec. 721. See, also, Richardson *v.* Baltimore, 8 Gill (Md.), 433, 1849; Alexander *v.* Baltimore, 5 *ib.* 383; Dudley *v.* Frankfort, 12 B. Mon. 610, 615, 1851.

§ 729. In respect of *property* held by municipal corporations *in trust, or clothed with public duties*, equity has always asserted its jurisdiction to see that the trusts were performed and the public duties discharged.[1] In England, and possibly, also in this country, the bill may in such cases be filed against the municipal corporation and its officers by the attorney general on behalf of the corporators or persons interested; or the latter may, perhaps, under the line of decisions in this country presently to be mentioned, exhibit the bill in their own names. The jurisdiction of chancery in such cases over municipal corporations is forcibly asserted by the House of Lords, in an interesting and important case in which the corporation of Dublin, under act of parliament, was the trustee of funds raised from water rates, to supply the city with water, and where the bill, charging the corporation with breaches of trust and mismanagement, was filed by the attorney general, on behalf of the inhabitants of Dublin paying water rates.[2] Here the public were interested in the proper administration of the authority which had been conferred upon the city corporation in respect to the supply of water to the city, and it is obvious that there was no adequate remedy at law, and hence the propriety

[1] Attorney General *v.* Liverpool, 13 Eng. Ch. (1 Mylne & Craig, 171) 343, 359, 1835; Attorney General *v.* Dublin, 1 Bligh, N. R. 312, 1827. *Ante*, p. 81, Sec. 37; p. 93, Sec. 47; chapter on Corporate Property, *ante*, Secs. 437–441; chapter on Dedication, *ante*, Sec. 515; Baltimore *v.* Railroad Company, 21 Md. 50 1863.

It is "a distinctive characteristic of a corporation that it is accountable in equity for *misapplication of trust funds*, whereas, any other body of men, as a parish, can only (where relief can be had at all) be touched through the individuals, or their representatives, who have committed the actual breach of trust:" Grant on Corp. 138. Mr. Spence discusses the subject of the equity jurisdiction over corporations as trustees satisfactorily: 2 Spence, Eq. Jurisd. 32–35.

[2] Attorney General *v.* Dublin, 1 Bligh, N. R. 312, 1827. See, also, Attorney General *v.* Liverpool, 13 Eng. Ch. (1 Mylne & Craig, 171) 343, 1835. The principles on which equity will enjoin the proceedings of *public officers* are stated by Lord *Cottenham:* Frewin *v.* Lewis, 18 Eng. Ch. (4 Mylne & Craig) 249, 1838. See, also, Baltimore *v.* Horn, 26 Md. 194, 1866; Holland's Case, 11 Md. 186; Baltimore *v.* Porter, 18 Md. 284, 1861; Attorney General *v.* Heclis, 2 Sim. & Stu. 67. Duties and liabilities of public officers: *Ante*, 176, and note.

of a resort to equity by the rate payers, in the name of the officer authorized to represent the public.[1]

§ 730. So the Court of Chancery, in England, notwithstanding another remedy (which is construed to be cumulative) is given by statute, will relieve against *fraudulent dispositions of corporate property*. And it will also interfere to prevent municipal councils from *abusing powers relating to property and funds* entrusted to them to be exercised in conformity with law for the benefit of the incorporated place or its inhabitants. The liberal, enlightened, and salutary view is taken, that the powers conferred by the Municipal Corporations Act upon councils in respect to the corporate property, are public trusts, and the property owned by the corporations is held by them in trust, and hence, if these powers are abused—as, for example, the power of a council to award compensation to officers of the corporation, or if corporate property is collusively alienated—this is a breach of trust of which equity will take cognizance.[2]

[1] In England it is settled, that in cases such as those mentioned in the text, or where the corporation is a trustee of property or funds for public uses, it can be made to account to the *crown*, on an information, but not to *private persons* in a suit in equity: Grant on Corp. 138; Skinner's Company *v.* Irish Society, 12 Cl. & F. 487. See, also, 2 Spence Eq. Jurisdic. 32–35. In a very recent case in California, it was decided that where a suit is instituted in the name of the state by the attorney general, on the relation of the real party in interest seeking relief, and the state has no interest therein, the attorney general, as such, has no power to control the suit or withdraw his consent to the use of the state's name, to the prejudice of the relator: People *v.* Railroad Company, 38 Cal. 564. See *ante*, Chap. XX. In a late case in New York, commissioners appointed under an act of the legislature sought to issue the bonds of a town authorized by that act for railroad purposes without performing conditions precedent required thereby, and it was held that the attorney general had no power at common law to maintain an action in the name of the people to restrain them: People *v.* Miner, 2 Lansing (N. Y.), 396. See 2 Spence Eq. Jurisdic. 35, note (*c*).

[2] Attorney General *v.* Poole, 4 Mylne & Cr. 17, 30, and overruling 2 Keen, 190, 206; Parr *v.* Attorney General, 8 Cl. & F. 409; Attorney General *v.* Aspinwall, 2 Mylne & Cr. 613, overruling Master of the Rolls, 1 Keen, 513; Attorney General *v.* Wilson, 9 Sim. 30; affirmed by the Lord Chancellor, 1 Cr. & Ph. 1; 2 Spence Eq. Jurisd. 34. If members of a corporation contrive a scheme to defraud a corporation of its property, they are *personally liable*: *Ib.* See, also, Attorney General *v.* Lichfield, 11 Beav. 120; Attorney General *v.* Leicester, 9 Beav. 546; Attorney General *v.* Plymouth, 9 Beav. 67; Regina *v.* Liverpool, 9 A. & E. 435; Grant on Corp. 137–139, 142. *Ante*

§ 731. In this country, the right of *property holders or taxable inhabitants* to resort to equity to restrain municipal corporations and their officers from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the tax-payers, such as making an unauthorized appropriation of the corporate funds, or an illegal disposition of the corporate property, or levying and collecting void and illegal taxes and assessments, under the circumstances presently to be explained, has been affirmed or recognized in numerous cases in many of the states. It is the prevailing doctrine on this subject. It can, perhaps, be vindicated upon principle, in view of the nature of the powers exercised by municipal corporations and the necessity of affording easy, direct, and adequate preventive relief against their abuse. It is advisable briefly to examine the doctrine and the grounds upon which it rests in the light of some of the leading judgments of the courts, in order to learn its scope, limitations, and application.

§ 732. The Supreme Court of Connecticut, in holding that a *citizen and tax-payer* of an incorporated city *is entitled to an injunction to restrain an illegal appropriation of the money* of the city, says, in substance, that this is so because the city corporation holds its moneys for the corporators, the inhabitants of the city, to be expended for legitimate corporate purposes, and a misappropriation of these funds is an injury to the tax-payer, for which no other remedy is so effectual or appropriate. If the money is taken out of the treasury, one person cannot well sue either the city or the person who receives the money for his proportion, and it is impracticable for all to unite in such a suit.[1] And when the amount thus misappropriated is subsequently needed for legitimate purposes, a citizen cannot resist the necessary tax because the corporation had, at a prior time, misappropriated money.[2]

Secs. 175, 176, and note. Conformably to these principles, where the municipal council, without authority of law, gave a bond to secure compensation out of the corporate funds to an officer of the corporation, this was held to be a breach of their trust, cognizable in chancery: Parr *v.* Attorney General, 8 Cl. & F. 409.

[1] Washington *v.* Harvard, 8 Cush. 66, 1851. *Post*, Chap. XXIII.

[2] New London *v.* Brainard, 22 Conn. 552, 1853 (appropriating money to celebrate the Fourth of July). *Ante*, Sec. 100. Scofield *v.* Eighth School

§ 733. The *same doctrine* has been expressly sanctioned by the Court of Appeals in Maryland, in a case in which it was held that residents and tax-payers of a city might file a bill in equity to restrain the corporation and its officers from taking steps to carry out a city ordinance creating a debt in violation of the constitution.[1] Mr. Chief Justice *Bartol*, in giving the judgment of that tribunal, observed that, "in this state the courts have always maintained, with jealous vigilance, the restraints and limitations imposed by law upon the exercise of power by municipal and other corporations. If the right to maintain such a bill as this be denied, citizens or property holders would be without adequate remedy to prevent the injury which might result to them from the unauthorized or illegal acts of the municipal government or its officers and agents."

District (illegal use of school house), 27 Conn. 499, 504, applying the same principle to the misappropriation of corporate property; Webster *v.* Harwington, 32 Conn. 131; Terrett *v.* Sharon, 34 Conn. 105.

Though money has been illegally voted by a city or town, and though the petitioners are entitled to resort to equity to restrain illegal appropriations, yet, if they have been guilty of *gross laches*, and have knowingly permitted *third persons* to incur liabilities in good faith, relying upon such appropriation for reimbursement, an *injunction* will be denied: Tash *v.* Adams, 10 Cush. 252, 1852. But parties in whose favor the illegal vote was made, though they incurred expenditures on the faith of it, are not third persons in the meaning of the principle: Claflin *v.* Hopkinton, 4 Gray, 502, 1855; compare, New London *v.* Brainard, *supra;* Hodge *v.* Buffalo, 2 Denio, 110. See Index — *Ultra Vires.*

If an appropriation of money be made for *two objects — one lawful* and *the other not*, and it cannot be distinguished and separated, the whole will be held void; otherwise the court will enjoin or relieve against the expenditure which is unlawful: Roberts *v.* Mayor, &c. of New York, 5 Abb. Pr. R. 41; Howes *v.* Racine, 21 Wis. 514.

County supervisors cannot, without the aid of legislative authority, pay a debt, though meritorious if it had been legally contracted, which is not legally obligatory upon the county: People *v.* Stout, 23 Barb. 349. See *ante*, Secs. 44, 398. *Infra*, Sec. 734.

[1] Baltimore *v.* Gill, 31 Md. 375, 395, 1869 (*ante*, Sec. 85); approving, New London *v.* Brainard, *supra*, and Merrill *v.* Plainfield, 45 N. H. 126; and disapproving, Roosevelt *v.* Draper, 23 N. Y. 318, and Doolittle *v.* Supervisors, 18 N. Y. 155, mentioned below, Sec. 735. See, also, in Maryland, Frederick *v.* Groshen, 30 Md. 436; Baltimore *v.* Porter, 18 Md. 284, 1861.

§ 734. So, in Illinois, on the ground that the remedy in equity is more direct, speedy, and effectual, than by *certiorari*, equity will entertain jurisdiction of a bill on behalf of tax-payers *to enjoin the misapplication of the moneys* of the corporation.[1] Based upon such considerations, it has been held that one or more tax-payers, without showing any other injury than that which they will suffer in common with other property holders of the municipality, may file a bill to *restrain the allowance and payment of an illegal claim*, or the collection of a tax for unauthorized objects, such as for example, to pay a fraudulent or collusive judgment;[2] or to pay the expenses of a railroad survey which there was no power to make;[3] or to refund to individuals money voluntarily contributed by them for the purpose of avoiding a draft in the town.[4]

§ 735. But, on the other hand, it has been several times decided in New York, that *resident citizens or tax-payers* of a municipal corporation *cannot, as such*, merely, either on their own behalf or on behalf of themselves and all others having a like interest, maintain a suit to restrain or avoid corporate acts alleged to be illegal. The principle applicable to public nuisances is there adopted. Such illegal acts are considered to affect the whole public; and the public, by its authorized public officers, must institute the proceeding to prevent or redress the illegal act, unless a private person is threatened with or suffers some *peculiar* damage to his individual interest — that is, some damage distinct from that of every other inhabitant, in which case he may maintain his bill for an injunction or for relief in his own name. Private persons may thus protect *their own* interests, but they cannot "assume to be the champions of the community, and in its behalf challenge the public officers to meet them in the courts of justice to defend their official acts." Therefore, an illegal alienation of property by a corporation, or an illegal act which may or will result in increased taxation,

[1] Colton *v.* Hanchett, 13 Ill. 615.

[2] Barr *v.* Deniston, 19 N. H. 170, 180, 1848. See, also, in same state, Merrill *v.* Plainfield, 45 N. H. 126; *supra*, Sec. 732, and note.

[3] Douglass *v.* Placerville, 18 Cal. 643.

[4] Drake *v.* Phillips, 40 Ill. 388, 1866. *Ante*, Sec. 103; *supra*, Sec. 732, and note.

cannot be questioned by a private person, or tax-payer, or property owner, unless it be *specially* injurious to him.[1]

§ 736. The author may observe that there appears to be no difference of judicial opinion as to the *right of the taxable inhabitants*, wherever the threatened illegal corporate act will in-

[1] This doctrine, left open in Ketchum *v.* Buffalo, 14 N. Y. 356, 1856, and 13 *ib.* 143, was first definitely established in New York in the Court of Appeals, in Doolittle *v.* Supervisors of Broome County, 18 N. Y. 155, 1858; disapproving, on this point, of the cases of Adriance *v.* Mayor of New York, 1 Barb. (South Car.) 19; Brower *v.* Same, 3 *ib.* 254; Christopher *v.* Same, 13 *ib.* 567; Milhau *v.* Sharp, 15 *ib.* 193; *Ib.* 244; and De Baum *v.* Mayor, &c. 16 *ib.* 392. So far as these and other prior New York cases, hold "that a person owning property fronting on a public street is entitled to maintain an action to restrain the commission of an act of nuisance in the street which, from the location of the plaintiff's premises, would render it specially injurious to him, I am of opinion that the law is correctly laid down as in Davis *v.* Mayor, 14 N. Y. 506:" *Per Denio*, J., 18 N. Y., *supra*, p. 163, and observe street cases reviewed on page 160. (See *ante*, Sec. 522.) The doctrine of this case was adhered to and extended to *cities*, in Roosevelt *v.* Draper, 23 N. Y. 318, 1861, which also considers the question when relief may be had by a *creditor:* Hale *v.* Cushman, 6 Met. 425, was decided upon the principle laid down in New York, but the right to equitable relief against illegal appropriations is now given by statute in Massachusetts: Frost *v.* Belmont, 6 Allen, 152.

The municipal corporation must be a *party:* Allen *v.* Turner, 11 Gray, 436. City collector is a *proper defendant:* Anderson *v.* State, 23 Miss. 459, 1852; New London *v.* Brainard, 22 Conn. 552, 1853.

The New York view is adopted in *Kansas*, where it is held that a suit having for its object the restraining of a county board from allowing a claim alleged to be illegal, and the clerk from drawing a warrant therefor, cannot be maintained by a person having no other interest than one common to all the resident tax-payers of the county. Such a suit, it is further held, cannot be maintained by a private person, unless the act complained of produces some peculiar damage to his individual interests, or affects his rights in a different manner from other members of the community; Craft *v.* Jackson County, 7 Kansas, not yet reported. See, also, as to restraining void tax: Burnes *v.* Achison, 2 Kansas, 454, 1864; compare, Leavenworth *v.* Norton, 1 *ib.* 432. And it seems to be followed in *Minnesota:* Conklin *v.* Commissioners, 13 Minn. 454. The subject is discussed by Mr. Justice *Campbell* in Bagg *v.* Detroit, 5 Mich. 336, 346, and in Chaffee *v.* Granger, 6 Mich. 51; Williams *v.* Detroit, 2 Mich. 560. See and compare Brown *v.* Manning, 6 Ohio, 298; *Ib.* 102; Denton *v.* Jackson, 2 Johns. Ch. 320; State *v.* Commissioners, 5 Ohio St. 497, 502; Culbertson *v.* Cincinnati, 16 Ohio, 579. A taxable inhabitant has no legal right to *intervene* in a pending suit and defend the action prosecuted against the corporation: Cornell College *v.* Iowa County, Iowa Supreme Court, Dec. Term, 1871, not yet reported.

crease the burden of taxation, to the aid of equity to prevent it. The difference is as to the *proper party plaintiff* in a bill of this character. If the ordinary principle is applied, it must be admitted that where the duty about to be violated by the corporation or its officers is public in its nature, and affects all of the inhabitants alike, that one, not suffering any special injury, cannot, in his *own name*, or by uniting with others, maintain a bill to enjoin it. And a reason urged against such a course is, that if one citizen may maintain such a bill, an indefinite number of others may each, also, bring separate suits; and an adjudication in one case concludes nothing as to the others, or as to the inhabitants at large. But it is agreed that any taxable inhabitant, or, perhaps, any citizen of the municipality, has such an interest to prevent or to avoid illegal corporate acts that he may be a relator, on whose application the proper public officer of the commonwealth may, on behalf of the public, file the requisite bill to enjoin the menaced illegal act, or, if it has been consummated, to have relief against it. To allow the taxable inhabitant to maintain a bill for an injunction, has the advantage of directness and simplicity, and, notwithstanding its departure from technical principles, has had the quite general, but not uniform, approval of the courts in this country; and practically, this course has not had the effect to engender a multiplicity of similar suits by separate parties, but a few persons usually unite in one suit, which, when judicially settled, in effect settles the question in controversy. There can be no doubt but that the corporation may, in its *own name*, bring suits in proper cases to be relieved against illegal or fraudulent acts on the part of its officers. Since, however, experience has shown how liable these corporations are to be betrayed by those who have the temporary management of these concerns, it would never do for the courts to hold that relief against illegal acts could *only* be had by an authorized suit brought by and in the name of the corporation.

§ 737. Respecting the right to *restrain a municipal corporating from collecting taxes*, the courts, in cases where this relief is proper to be granted, have generally held that one or more tax-payers may bring a bill for this purpose.[1] There is, however, some want of harmony in the decisions as to what will

justify equitable interference, but the correct view doubtless is that equity ought not, except for the clearest reasons, to interfere with the speedy and ordinary collection of municipal or other public revenues. If there is no power to levy the tax in question under any circumstances, or if it be assessed upon property not subject to taxation, and the remedy at law is not adequate, a plain case for equitable interposition is made out. But if the power to levy the tax exist, and the property be subject to taxation, mere errors and irregularities should, according to the better considered view, be corrected on *certiorari* or other appropriate proceedings, or their effect left to be tested at law; for *equity* ought not to interfere with the collection of taxes, unless the complainant makes a case coming within some acknowledged head of equity jurisdicton, such as the prevention of a multiplicity of suits, irreparable injury, or where a cloud will be thrown upon his title to real estate.

[1] The right of tax-payers to unite in a bill and ask for an injunction to restrain the collection of an unauthorized tax was expressly ruled in Vanover *v.* Justices, &c. 27 Geo. 354, 1859, *Lumpkin*, J., observing: "We approve the remedy resorted to in this case. It is not only more complete than any other, but the only one, in our judgment, which meets the exigencies of the case." See, also, Bull *v.* Read, 13 Gratt. (Va.) 78; Nill *v.* Jenkinson, 15 Ind. 425; Lewis *v.* Henley, 2 *ib.* 332; Barr *v.* Deniston, 19 N. H. 170, 180, 1848; Frederick *v.* Augusta, 5 Geo. 561, 1848; Baltimore *v.* Porter, 18 Md. 284, 1861; King *v.* Wilson, 1 Dillon C. C. 555, 1871. Amount of tax necessary to give *federal court jurisdiction: Ib.*

In Worth *v.* Fayetteville, 1 Winst. (N. Car.) Law & Eq. R. No. 2, 70, 1864, C. J. *Pearson*, with great difficulty as to jurisdiction, expressed the opinion that equity might entertain a bill to test the legality of a tax imposed by a municipal corporation, but doubted whether such a bill will lie to enjoin the collection of state and county taxes. The case does not show that the illegal tax was sought to be made by the sale of real estate, or in what manner the tax was about to be enforced. A tax-payer, on behalf of himself and all other tax-payers of the state, may file a bill against the proper state officers and parties to enjoin the issue of state bonds under an unconstitutional statute: Galloway *v.* Railroad Company, 63 North Car. 147, 1869. In Indiana it is considered that "the assessment of taxes for state purposes is a matter of public concern in which all the citizens of the state are interested, and hence any citizen of the state may be the relator" in proceedings to compel officers of the revenue law to see that its provisions are carried out: State *v.* Hamilton, 5 Ind. 310, 1854, *per Perkins*, J.; Hamilton *v.* State, 3 *ib.* 452.

Unless he can make such a case he must bring a legal action or pursue a legal remedy.[1]

§ 738. Accordingly, equity will not restrain even an illegal and void tax assessment where it is sought to be enforced against *personal property only*, since here the party has an adequate remedy at law: nor in such a case will equity interfere because several join in the bill asking it.[2] Where, however, the effect of the sale will be to cast a cloud upon the title to *real estate*, equity, in many of the states, will, for this reason alone, interfere to prevent it. The Court of Appeals in Maryland, in holding that where a city corporation was seeking to enforce a void tax or assessment by a sale of private property, the owner might enjoin it, speaking through *Le Grand*, C. J., said: "We entertain no doubt on this question. The idea that a party ought to stand by and see his property illegally exposed to public sale, and then force the purchaser to bring ejectment to gain possession or to try his title, seems sustained by no good authority. Such a doctrine would not only encourage circuity of action and multiplicity of suits, but render the title of the real owner comparatively valueless, while the suits at law should be pending. Equity will not allow a title otherwise clear, to be clouded by a claim which cannot be enforced

[1] Dows *v.* Chicago, 11 Wall. 108, 1870; approving, Heywood *v.* Buffalo, 14 N. Y. 534, 1856; Bank *v.* Supervisors, 25 N. Y. 312; Cook County *v.* Railroad Company, 35 Ill. 465. These cases fully support the doctrine of the text, which is, indeed, extracted from them. See, also, McLot *v.* Davenport, 17 Iowa, 379, 1864, in which the remedies of the tax-payer are fully pointed out by *Cole*, J.: Dodd *v.* Hartford, 25 Conn. 232; Dean *v.* Todd, 22 Mo. 91; Lockwood *v.* St. Louis, 24 Mo. 20, 1856; Hughes *v.* Kline, 30 Pa. St. 227; Livingston *v.* Wider, 53 Ill. 302, 1870; Green *v.* Mumford, 5 Rh. Is. 472, 1858, where the rule is strictly held, that to warrant a resort to equity the remedy at law must be inadequate. See *ante*, Sec. 476, and note; Sec. 522; Sec. 727, 735.

Mode of collecting taxes and assessments: Ante, Sec. 653, *et seq.*

[2] Dodd *v.* Hartford (decided by two judges), 25 Conn. 232, 1856; Sheldon *v.* School District, *ib.* 224. Same point, as to personal property: Lockwood *v.* St. Louis, 24 Mo. 20, 1856; Dows *v.* Chicago (tax on bank stock), 11 Wall. 108, 1870. *Ante*, Secs. 654, 727, and notes. Courts will, indeed, in all cases, cautiously interfere with the exercise of an admitted power: manifest abuse must be shown: Sheldon *v.* School District, 25 Conn. 224. *Ante*, Sec. 58, and notes; Sec. 248; Sec. 286.

in law or equity."[1] So in Wisconsin the law is settled that equity will interfere to prevent a cloud upon the plaintiff's title, where his lands are threatened to be sold on a *void tax or assessment.* But where the defect complained of is merely formal, not impeaching the justice of the tax or assessment, and the plaintiff ought to pay the amount, equity will not interfere, but leave him to his legal remedies.[2]

[1] Holland *v.* Baltimore, 11 Md. 186, 1857; Baltimore *v.* Porter, 18 Md. 284, 1861. *Ante*, p. 92, Sec. 45. In New York, the somewhat stricter view is adopted, that to justify equity in interfering to prevent a cloud being cast upon the title, it must be a proceeding whose invalidity does not appear on its face, but requires extraneous evidence to show it: Heywood *v.* Buffalo, 14 N. Y. 534, 1856; cited with approval, Ewing *v.* St. Louis, 5 Wall. 413, 419, 1866. *Ante*, Sec. 476.

[2] Mitchell *v.* Milwaukee, 18 Wis. 92, 97, 1864, and prior cases in that state there cited. See, also, Foote *v.* Milwaukee, 18 Wis. 270; Myrick *v.* La Crosse, 17 *ib.* 442; Bond *v.* Kenosha, 17 Wis. 284, 287, where *Cole*, J., very clearly states the effect of the decisions: Howes *v.* Racine, 21 Wis. 514; Dean *v.* Gleason, 16 Wis. 1, 18; Barnes *v.* Beloit (who may not join in bill), 19 Wis. 93, 1865; *quære.*

So in *Iowa*, a bill for an injunction to restrain sale of real estate may be sustained if the proceedings to tax it are clearly illegal: Litchfield *v.* Polk County, 18 Iowa, 70; Railroad Company *v.* Mt. Pleasant, 12 *ib.* 112.

In *Indiana* it is held that where the owner of real estate in a city stands by and sees a street improved adjoining his property, on a contract made under an order of the common council, without attempting by injunction to prevent such improvement, he cannot, after the work is completed, or nearly completed, refuse to pay for it: La Fayette *v.* Fowler, 34 Ind. 140; Same principle: Sleeper *v.* Bullen, 6 Kansas, 300, 1870. Extension by the city to the contractor of the time to complete the improvement is no ground for an injunction to stay the collection of the assessment: *Ib.* So where an owner of property sees a contractor go on and make a street improvement adjoining his property, under a contract with the city, and makes no objection while the work is being done, he cannot, after the work is completed, and accepted by the city as having been done according to the contract, enjoin the collection of the entire assessments made for such improvement, on the ground that the materials used, and the work done, were not strictly in accordance with the contract; in such case, a complaint for an injunction must show a tender, by the property owner to the contractor, of the value of the improvement: Evansville *v.* Pfisterer, *ib.* See, also, as to *effect of delay* in equity, until the improvement is completed: Weber *v.* San Francisco, 1 Cal. 455. *Infra*, Sec. 743, note. So, also, in Kansas it is decided that courts of equity will not interfere to restrain by injunction the collection of taxes, when the property is subject to taxation, the tax legal, and the valuation not excessive, simply because of irregularities in the assessment: Kansas P. R. Co. *v.* Russel, 1871, not yet reported. See, also, Sleeper *v.* Bullen, 6 Kansas, 300, 1870.

Remedy by Certiorari.

739. It is well settled in England that courts of superior and general jurisdiction will examine on *certiorari* the proceedings of inferior or special jurisdictions or officers. Thus, *certiorari* lies to the censors of the college of physicians,[1] to commissioners of sewers,[2] and to justices of the peace.[3] Such a superintending power to restrain and correct the irregularities and mistakes of inferior officers and jurisdictions is both necessary and salutary. If the proceedings are in a common law court of record, a writ of error is the proper remedy to correct or vacate them if erroneous; otherwise, the remedy is by *certiorari*.[4] So, in *this country*, the rule has been very generally adopted by the courts, where a new jurisdiction is created by statute, and the inferior court, board, tribunal, or officer exercising it, proceeds in a summary manner, or in a course different from the common law, that the circuit or district court of the state, or other tribunal exercising general original common law jurisdiction, has, in the absence of a specific remedy being given, an inherent authority to revise the proceedings of such inferior jurisdiction by *certiorari;* and in such cases a writ of error is not, without the aid of statute, the proper remedy to effect the removal of the proceedings to the revisory tribunal.[5]

§ 740. The unquestionable weight of authority in this country is, if an appeal be not given, or some specific mode of review provided, that the superior common law courts will, on *certiorari*, *examine the proceedings of municipal corporations*, even

[1] Groenvelt *v.* Burwell, 1 Ld. Raym. 454, 469, and cases there cited; 1 Salk. 144.

[2] *Ibid.*

[3] Rex *v.* Inhabitants (Caerdiffe Bridge Case), 1 Ld. Raym. 580.

[4] Parks *v.* Boston, 8 Pick. 218, 226, 1829; Lawton *v.* Commissioners, &c. 2 Caines, 182; Wood *v.* Peake, 8 Johns. 54; Wildy *v.* Washburn, 16 Johns. 49.

[5] *Ante*, p. 361, Sec. 368; p. 458, Sec. 476; Intendant, &c. *v.* Chandler, 6 Ala. 899, 1844; *Ex parte* Tarlton, 2 Ala. 35, 1841. In Matter of Negus, 10 Wend. 34, 39, 1832; Ruhlman *v.* Commonwealth, 5 Binn. 26, 1812; Savage *v.* Gulliver, 4 Mass. 178; Commonwealth *v.* Ellis, 11 *ib.* 465; Edgar *v.* Dodge *ib.* 670; Ball *v.* Brigham, 5 Mass. 406; Bob (a slave) *v.* State, 2 Yerg. (Tenn.) 173, 1826; Lawson *v.* Scott, 1 *ib.* 92; Wildy *v.* Washburn, 16 Johns. 49; Street *v.* Francis, 3 Ohio, 277; State *v.* Bill, 13 Ire. Law (North Car.), 373, 1852; Redfield on Railw. Chap. XXVI.

although there be no statute giving this remedy; and if it be found that they have exceeded their chartered powers, or have not pursued those powers, or have not conformed to the requirements of the charter or law under which they have undertaken to act, such proceedings will be reversed or annulled. An aggrieved party is, in such case, entitled to a *certiorari ex debito justitiæ*.[1]

Thus, if no appeal or other mode of review be given, and if there be no statute to the contrary, the legality of convictions in *municipal courts* will be revised on *certiorari*.[2] So, under the same circumstances, and in the same way, the proceedings of municipal corporations in *opening streets*,[3] in making *local assess-*

[1] State *v.* Bill, 13 Ire. (North Car.) Law, 373, 1852; Intendant *v.* Chandler, 6 Ala. 899, 1844; Carroll *v.* Mayor, &c. 12 Ala. 173; Jackson *v.* People, 10 Mich. 111, 1860, cited *ante*, p. 362, note; State *v.* Stewart, 5 Strob. (South Car.) Law, 29; State *v.* Swift, 1 Hill (South Car.) 360; Dwight *v.* Springfield, 4 Gray, 107, 1855; Parks *v.* Boston, 8 Pick. 218, 1829; Fay, Petitioner, 15 Pick. 243, 1834; Cunningham *v.* Squires, 2 West Va. 422, 1868; Taylor *v.* Americus, 39 Ga. 59, 1869; Mayor *v.* Shaw, 16 Ga. 172, 1854; Shaw *v.* Mayor, 19 Ga. 468; Burns *v.* La Grange, 17 Texas, 415, 1856; Buckner, *Ex parte*, 4 Eng. (Ark.) 73, 148; Camden *v.* Mulford, 2 Dutch. (N. J.) 49; Carron *v.* Martin, *ib.* 594, 1857; Morris Canal Company *v.* Jersey City, 1 Beasley (N. J.), 252; Holmes *v.* Jersey City, *ib.* 299; State *v.* Newark, 1 Dutch. 399, 1856; State *v.* Hudson, 32 N. J. 365; Swan *v.* Cumberland, 8 Gill (Md.), 150, 1849; Dorchester *v.* Wentworth, 11 Fost. (N. H.) 451; Railroad Company, *v.* Whipple, 22 Ill. 105; Ewing *v.* St. Louis, 5 Wall. 413, 1866. *Ante*, p. 361, Sec. 368; p. 458, Sec. 476; p. 606, Sec. 643.

[2] Taylor *v.* Americus, 39 Ga. 59, 1869; Intendant *v.* Chandler, 6 Ala. 899, 1844; Jackson *v.* People, 10 Mich. 111, 1860. *Ante*, Sec. 368, and note, and remarks of Mr. Justice *Campbell*.

[3] *Ex parte* Tarlton, 2 Ala. 35; Dwight *v.* Springfield, 4 Gray, 107; Carron *v.* Martin, 2 Dutch. (N. J.) 594, 1857; Dorchester *v.* Wentworth, 11 Fost. (N. H.) 451; Parks *v.* Boston, 8 Pick. 218, 225; Ewing *v.* St. Louis, 5 Wall. 413, 1866, cited *ante*, Sec. 476, note.

It seems to be the settled view in New York, that without a statutory enlargement of the functions of the writ of *certiorari*, it will be denied, or if granted, it will be quashed when it is sought for the purpose of reviewing the official or *corporate* proceedings of a common council when they are of a legislative, executive, or ministerial character; as, for example, the regularity of proceedings by ordinances or resolutions under the right of eminent domain to open streets, squares, &c. and for constructing sewers in streets, and the like improvements, including assessments therefor; and the regularity of proceedings voting taxes, appointing officers, making by-laws, &c. &c.: People *v.* Mayor, &c. 2 Hill (N. Y.), 9, 1841. In Matter of Mount Morris Square, *ib.* 14, questioning Parks *v.* Boston, *supra*, which holds

ments, or *levying taxes*,[1] in contested *election cases*,[2] and the like, will be examined and reviewed, to ascertain whether they are legal and regular, and if not so, they will be quashed.

§ 741. At common law *certiorari* only lies to inferior *courts* and officers exercising *judicial* powers; not only so, but the act to be reviewed must be *judicial* in its nature, and not merely ministerial.[3] But the doctrine that *certiorari* lies only to examine the validity of such ordinances and acts of a municipal corporation as are of a *judicial* character, and not such as are legislative or ministerial in their nature is not adopted in New

that proceedings to open streets may be reviewed on *certiorari*, and also, doubting Le Roy *v.* Mayor, &c. 20 Johns. 430, and Baldwin *v.* Calkins, 10 Wend. 166, so far as the latter asserts that the *principle of assessment* may be reviewed by *certiorari*. It is admitted, however (2 Hill, 24), that the writ will lie to the local courts or corporate officers exercising judicial functions. See, further, as to remedy by certiorari: People *v.* Supervisors, 15 Wend. 198; Same *v.* Same, 1 Hill, 195; 23 Wend. 277; Stone *v.* Mayor, 25 Wend. 157, 167, *per Paige*, Senator; *Ib.* 693. The doctrine of the New York cases denying that the proceedings of municipal corporations in opening streets, making assessments, &c. can be reviewed on *certiorari*, followed in Dixon *v.* Cincinnati, 14 Ohio, 240, 1846, but the weight of authority is otherwise. See chapter on Eminent Domain, *ante*, Sec. 476.

[1] State *v.* Newark, 1 Dutch. (N. J.) 399, 1856; Swann *v.* Cumberland, 8 Gill (Md.), 150, 1849; Buckner, *Ex parte*, 4 Eng. (Ark.) 73, 1848; Carroll *v.* Mayor, &c. 12 Ala. 173. *Ante*, p. 606, Sec. 643, and note 4.

Certiorari lies at common law *to remove a tax assessment*, but as the allowance of the writ is discretionary, it is generally refused on grounds of public policy and convenience. *Per Beardsley*, J., Weaver *v.* Devendorf, 3 Denio, 117–119; 15 Wend. 198; 1 Hill (N. Y.), 195; 2 Hill, 9, 11; *Ib.* 14–21. But it ought, we think, to be freely allowed whenever necessary to protect the citizen in his legal rights. Effect of not resorting to *certiorari* on the right to an injunction against assessments for local improvements: Ottawa *v.* Railroad Company, 25 Ill. 43, 1860; Ewing *v.* St. Louis, 5 Wall. 413.

[2] Cunningham *v.* Squires, 2 West Va. 422, 1868. Further, as to power to review on *certiorari* the regularity of the proceedings of inferior tribunals in cases of *contested elections*: Gibbons *v.* Sheppard, 65 Pa. St. 20, 1870; S. C. Brightley's Election Cases, 538. *Ante*, Chap. IX. on Municipal Elections; also, p. 361, Sec. 368; Sec. 715.

[3] Bacon's Abr. *Certiorari*, B.: People, &c. *v.* Mayor, &c. of New York, 2 Hill (N. Y.), 9; 11 *ib.* 21, 1841. Street and assessment cases: People, *v.* Covert, 1 Hill, 674. In Fonda *v.* Canal Appraisers, 1 Wend. 288, a *certiorari* was granted where the damages of a party were appraised without notice, and without giving him an opportunity to be heard or to produce testimony.

Jersey, but in that state this writ has long been used to test the validity of the acts and ordinances of such corporations, whatever their nature, whether legislative, ministerial, or judicial, and is considered ordinarily to be the appropriate remedy; but equity will also, in proper cases, entertain jurisdiction.[1] And in other states the powers with which the municipal authorities are clothed, to be exercised whenever in their opinion the convenience or welfare of the inhabitants requires it, are considered to be *judicial*, and hence *certiorari* lies to remove proceedings thereunder to the proper court for examination; but if the local authorities have decided that the public convenience or welfare requires the exercise of the power, as, for example, the establishment or improvement of a street, the decision of such a question cannot be judicially revised on *certiorari*.[2] This is so for the reason that questions of this character are not judicially reviewable,[3] and for the further reason that *certiorari*, unless otherwise provided by statute, only lies to correct errors of law in inferior jurisdictions. Where an appeal is allowed, it in general, takes up the cause or proceeding for determination *de novo*, unless otherwise ordered by statute; but *certiorari* is not a substitute for an appeal, and is not designed to correct errors of fact.[4]

[1] Camden *v.* Mulford, 2 Dutch. (N. J.) 49, 1856; Carron *v.* Martin, *ib.* 594, 1857; Morris Canal Company *v.* Jersey City, 1 Beasley (N. J.), 252; Holmes *v.* Jersey City, *ib.* 299. Further, as to office of the writ: State *v.* Hudson, 32 N. J. 365; State *v.* Donahay, 1 Vroom, 404; Jersey City *v.* State, *ib.* 521; State *v.* Water Commissioners, *ib.* 247. *Supra*, Sec. 727, and note. What acts are judicial, and what ministerial, in their nature; Camden *v.* Mulford, *supra.*

[2] Dwight *v.* Springfield, 4 Gray, 107, 1855; Parks *v.* Boston, 8 Pick. 218, 1829; Stone *v.* Boston, 2 Met. (Mass.) 220; Fay, Petitioner, 15 Pick. 243, 1834; Monterey *v.* Commissioners, 7 Cush. 394, 1851. *Ante*, Sec. 58. In Georgia, *certiorari* was held to lie to a city council that accused, tried, and dismissed a city officer for alleged official neglect, the constitution providing that the superior courts "shall have power to correct errors in inferior judicatories, by writ of *certiorari*," and the council, in trying and dismissing their officer, being regarded as a judicatory: Mayor, &c. *v.* Shaw, 16 Ga. 172, 1854. See Shaw *v.* Mayor, &c. 19 *ib.* 468.

[3] *Ante*, Secs. 58, 728.

[4] State *v.* Bill, 13 Ire. (North Car.) Law, 373; State *v.* Stewart, 5 Strob. (South Car.) 29; State *v.* Swift, 1 Hill (South, Car.), 360; State *v.* Cockrell, 2 Rich. (South Car.) 6 *Post*, Sec. 742.

§ 742. Although there is some contrariety of opinion as to just what the writ removes, and as to whether the evidence, if certified, can be considered at all, the more liberal and better view is, that the revisory court may not only *inquire into the jurisdiction of the inferior tribunal, but into errors of law* occurring in the course of the proceedings and affecting the merits of the case, and may also examine the *evidence* embodied in the return, "not to determine whether the probabilities preponderate one way or the other, but simply to determine whether the evidence is such that it will justify the finding as a legitimate inference from the facts proved, whether that inference would or would not have been drawn by the superior tribunal."[1]

§ 743. From inferior jurisdictions or an appeal writ of error exists only as it is provided by law, but where a remedy by writ of error or by appeal is given, a *common law certiorari cannot be sustained.*[2] But if an appeal where it exists is im-

[1] Jackson *v.* People, 10 Mich. 111, 1860, where the subject is fully and ably examined by Mr. Justice *Campbell*, and the propositions of the text fortified by the authorities cited. In Massachusetts it is held, that the Superior Court, on *certiorari*, can only examine into the regularity and legality of the proceedings; that is, whether the inferior jurisdiction has pursued the powers granted and conformed to the requirements of the law under which it professes to act. *Ante*, p. 362, note; Parks *v.* Boston, 8 Pick. 218; Dwight *v.* Springfield, 4 Gray, 107; Fay, Petitioner, 15 Pick. 243. In New York a stricter view seems to prevail, and it is held that the supervisory court is confined, if its powers are not enlarged by statute, to an examination "to see whether the limited (or subordinate) jurisdiction have exceeded their bounds," kept within the limits of its jurisdiction. The case cannot be re-tried upon the evidence or its merits. The record alone, or that which stands for it, is regarded: People, &c. *v.* Mayor, &c. of New York, 2 Hill, 9, 1841; In Matter of Mount Morris Square, 2 Hill, 14; 1 Hill, 674; Stone *v.* Mayor, &c. 25 Wend. 157, 167, and authorities cited by Paige, Senator; People *v.* Rochester, 21 Barb. 656; S. P. 2 Hill, 27, and cases there cited; Rex *v.* Morely, 2 Burr. 1040, 1042; 25 Wend. 168, and authorities there cited; *Ex parte* Mayor, &c. 23 Wend. 277, and cases cited and commented on by *Cowen*, J.; 6 Wend. 565.

[2] Duggen *v.* McGruder, Walk. (Miss.) 112; Rundle *v.* Baltimore, 28 Md. 356, 1867; Storm *v.* Odell, 2 Wend. 287; State *v.* Wakely, 2 Nott & McC. 410; In Matter of Mount Morris Square, 2 Hill (N. Y.), 14, 27, and the many authorities cited by *Cowen*, J.; and it was there held that the right of opposing in the Supreme *Court* the report of the commissioners of estimate and assessment in proceedings to open and widen streets, was in the nature of a remedy by appeal, and therefore *certiorari* would not lie to review their

properly denied, or if the party is deprived of it by fraud or accident, he may have his whole case reviewed by a *certiorari*, both as to matters of law and fact; and where the right of appeal is not allowed, or does not exist, the aggrieved party is still entitled to have his case revised by a superior tribunal.[1]

Remedy by Prohibition.

§ 744. In some of the states the *writ of prohibition* is resorted to to prevent municipal corporations from transcending the bounds of their jurisdiction or exercising powers not conferred.[2] A manifest difference between the writ of prohibition and the writ of injunction is this: the former operates upon the *court*, and the judge or officers who disregard it may be punished; the latter operates upon the *party* alone, but does not interfere

proceedings. See, also, People *v.* Covert, 1 Hill, 674. *Ante*, Sec. 139; Sec. 368; Sec. 476. So, *delay* may defeat right to a *certiorari:* Elmendorf *v.* Mayor, &c. 25 Wend. 693, adopting analogy of statute relative to writs of error. *Supra*, p. 607, note; Sec. 738, note. *Writ how directed:* Bogart *v.* Mayor, &c. 7 Cow. 158. *Practice under writ:* Mayor *v.* Shaw, 14 Geo. 162.

[1] State *v.* Bill, 13 Ire. (Law) North Car. 373, 1852. As to right and manner of appeals by municipal corporations, see, generally, chapter on Municipal Courts, *ante*, Secs. 361, 367, 368; also, Pottsville *v.* Curry, 32 Pa. St. 443; Robinson *v.* County, 6 Watts & S. 16; Monaghan *v.* Philadelphia, 4 Casey, 207. Supersedeas necessary to stay proceedings to open street: Dusseau *v.* Municipality, 6 La. An. 575.

[2] Mayo *v.* James, 12 Gratt. (Va.) 17; Warwick *v.* Mayo, 15 *ib.* 528; Clayton *v.* Heidelberg, 9 Sm. & Marsh. 623. In *Arkansas* the writ does not lie where the inferior court has jurisdiction of the subject matter on a suggestion of erroneous proceedings: Blackburn, *ex parte*, 5 Ark. 21. The reports of judicial decisions in *South Carolina* show that it is the constant practice in that state to restrain, by *prohibition*, not only inferior *judicial* tribunals, but also municipal corporations and corporations *sub modo* from the exercise of unwarranted powers, or the imposition of penalties beyond their jurisdiction: State *v.* Commissioners of Roads, 1 Const. R. 1817, 55, where the subject is fully examined; McKee *v.* Town Council, Rice Law, 24, 1838; City Council *v.* Pinckney, 1 Const. R. 1812, p. 42; S. C. 3 Brev. 217; Zylstra *v.* Charleston, 1 Bay, 382. If an appeal is given, that course is the proper one for the aggrieved party to pursue if he wishes a trial *de novo*, and, in general, he is entitled to a *certiorari*, if he has no other remedy, in order to review errors of law committed by the inferior jurisdiction: State *v.* Wakely, 2 Nott & McCord (South Car.), 410, 1820; State *v.* Cockrell, 2 Rich. (South Car.) Law, 6, *per Evans*, J.; McDonald *v.* Elfe, 1 Nott & McC. 501.

with the court itself.[1] Where prohibition is a proper remedy, the writ will not be granted unless the party is in danger of being injured by a suit *actually depending;* it will not be granted because such a suit is threatened.[2]

Remedy by Indictment.

§ 745. It is a clear principle of the *English law*, that all corporations, municipal as well as private, which owe duties to the public, are liable to indictment for malfeasance as well as nonfeasance in respect to such duties. The duty, however, must be one which is devolved on the corporation by prescription or by statute—it must be a duty or obligation of a public nature, and one, it is supposed by the author, mandatory in its nature, and not discretionary. This method of redress on the part of the public against municipal corporations is most frequently resorted to for their failure to maintain and repair bridges or highways in compliance with a prescriptive duty or statutory command; but the principle is general in its character within the limits above indicated.[3]

[1] Mealing *v.* Augusta, Dudley (Geo.), 221, 1833. Where a city council is not a *court*, but is exercising the powers given to it as the governing body of the corporation, it is not such a tribunal as can, in the opinion of the Superior Court of Georgia, be reached by prohibition: Mealing *v.* Augusta, Dudley, 221.

[2] Mealing *v.* Augusta, Dudley (Geo.), 221, 1833.

Respecting the nature of the *writ of prohibition and the practice under it:* Mayo *v.* James, 12 Gratt. (Va.) 17; 3 Black. Com. 112; 8 Bac. Abr. 206, title, Prohibition; 7 Comy. Dig. 135, same title; Home *v.* Earl Camden, 2 H. Bl. 533; Gould *v.* Gapper, 5 East, 345; 1 Saund. 136, and notes; *Ex parte* Williams, 4 Pike (Ark.), 537, and note, giving *forms* used in the proceeding; Arnold *v.* Shields, 5 Dana (Ky), 18; Clayton *v.* Heidelberg, 9 Sm. & Marsh. 623, 1848, where the office of the writ is discussed.

[3] Mayor, &c. of Lyme *v.* Henley, 3 B. & Ad. 77; S. C. 2 Clark & Fin. 331; Calls. Sewers, 116, 117; Regina *v.* Railway Company, 9 Q. B. 315; 9 Ad. & Ell. (N. S.) 314; Rex *v.* Mayor, &c. 14 East, 348; Grant, Corp. 283; Rex *v.* Railroad Company, 9 Car. & P. 469; Rex *v.* Oxfordshire, 16 East, 223; 1 Kyd, 225, 226; 6 Maule & Selw. 365, note. *Ante*, p. 212, note; Sec. 505, and notes. See Regina *v.* Nott, 4 Q. B. 773 Other mode of enforcing *such* duties, see chapter on *Mandamus*, *ante*, Sec.

Appearance is enforced by distress; Regina *v.* Railway Company, 3 Ad. & Ell. (N. S.) 223. And, upon conviction, the corporation may be fined: *Ib.* Upon an indictment against a town for not making or repairing a highway, the town cannot object that the record of the laying out of the

§ 746. In *this country* the same principles have been recognized, and corporations are generally regarded as indictable for misfeasance, as well as non-feasance, respecting duties of a public nature, plainly enjoined by the legislature for the benefit of the public. The modern view is to assimilate corporations as to their duties and responsibilities, so far as possible, to individuals. It is admitted that they cannot be indicted for felonies, but it is clear that they may be for acts done to the injury and annoyance of the public, and which amount to a nuisance.[1]

§ 747. In Tennessee a municipal corporation is considered liable, upon the general principles of the common law, to indictment for *neglecting its duty to keep its streets in reasonable repair*, and it is no defence that the street is little used, and is in a remote part of the town.[2] And the mayor and aldermen may also be personally indicted for like neglect of duty.[3] So in the

road shows that one of *the land owners*, over whose land the road was laid, *was not notified*. Such an objection should be made before the road was finally established: State *v.* Raymond, 7 Fost. (N. H.) 388, 1853. *Notice: Ante*, Sec. 471.

Twenty years acquiescence, on the part of a town, in the doings of their selectmen in the laying out of a highway and the making of repairs during that period, estop the town when indicted from claiming that the road was not legally laid out: State *v.* Boscawen, 32 N. H. 331, 1855. See *ante*, chapter on Dedication, Secs. 500, 505.

[1] Commonwealth *v.* Proprietors of Bridge, 2 Gray, 339, and cases cited; Commonwealth *v.* Railroad Corporation, 4 Gray, 22, 1855. Freeholders, &c. *v.* Strader, 3 Harr. (N. J.) 108; State *v.* Railroad Company, 3 Zabr. (N. J.) 360; State *v.* Hudson County, 1 Vroom (N. J.), 137, 1862, cited *infra*; State *v.* Railroad Company, 27 Vt. 103; Phillips *v.* Commonwealth, 44 Pa. St. 197; Redfield on Railways, Chap. XXIX. It is held in Massachusetts that a railroad constructed over a public highway in such a manner as to obstruct the public travel is liable to indictment, this being the proper redress for the public: Commonwealth *v.* Railroad Corporation, 2 Gray, 54, 1854; Cambridge *v.* Railroad Company, 7 Met. 70. See Railroad Company *v.* State, 3 Head (Tenn.), 523.

[2] Chattanooga *v.* State, 5 Sneed (Tenn.), 578, 1858; State *v.* Barksdale, 5 Humph. (Tenn.) 154; State *v.* Mayor, 11 *ib.* 217, where form of indictment is given. *Post*, Chap. XXIII. as to repairs of streets.

[3] Hill *v.* State, 4 Sneed (Tenn.), 443, 1857.

And in *Pennsylvania* an indictment lies as at common law against public officers for neglect of public duties; and the principle was extended to a contractor for the repair of roads: Phillips *v.* Commonwealth, 44 Pa. St. 197.

same state it is held, upon the general principles of the law, that if a municipal corporation has power by its charter to pass such ordinances as may be necessary "*to preserve the health* of the town, and to prevent and remove nuisances," it is its positive duty to exercise this power, and that for a *neglect of this public duty* it or its officers are liable to an indictment. An indictment against the mayor and aldermen was accordingly sustained for *permitting a slaughter house* to be kept upon the private property of a citizen of the town to the annoyance of the inhabitants and the exposure of the public health, the court remarking that "An indictment against the corporation is the proper mode of redress by the public for a grievance of this nature."[1]

So, also, in Kentucky a municipal corporation is indictable as at common law for *suffering its streets* to become and remain out of repair.[2]

In Vermont a town is liable to an indictment as at common law for not *erecting a bridge* pursuant to an order from a competent tribunal.[3]

In Maine, towns charged with the maintenance of *public highways* are by *statute* indictable for failing to discharge their duty in this respect; and the general principle is asserted in such cases, that where the town is civilly liable in damages it may be indicted.[4]

Authorities relating to indictments against *public officers*, see chapter on Corporate Officers, *ante*, Chap. IX. p. 212, note.

Requisites of indictment against official or corporate body for non-repair of streets: State *v.* Commissioners of Halifax, 2 Dev. 345. *Ante*, Chap. IX. p. 212, note. Facts which will sustain an indictment: Davis *v.* Bangor, 42 Maine, 522; Howard *v.* Bridgewater, 16 Pick. 189.

[1] State *v.* Shelbyville, 4 Sneed (Tenn.), 176, 1856; Hill *v.* State, *ib.* 443.

But in Vermont it has been held that a town is not indictable for not removing nuisances; as, for example, a stagnant and noxious pool of water beside a street, not created by it or its agents: State *v.* Burlington, 36 Vt. 521, 1864. Whether a municipal corporation is liable to indictment for keeping and maintaining a "*calaboose*," if it is so situated or managed as to become a nuisance, *quære:* Paris *v.* People, 27 Ill. 74.

[2] Commonwealth *v.* Hopkinsville, 7 B. Mon. (Ky.) 38, 1846; Hamar *v.* Covington, 3 Met. (Ky.) 494, 1861, *per Peters*, J.

[3] State *v.* Whittingham, 7 Vt. 390, 1835.

[4] *Per Weston*, C. J., State *v.* Great Works Milling Company, 20 Maine, 41, 1841; Davis *v.* Bangor, 42 Maine, 522, 1856; State *v.* Gorham, 37 Maine, 451

§ 748. On the ground that the legislation, both colonial and state, had imposed the duty of *repairing bridges* on the township, and had never recognized the common law principle of holding the inhabitants of counties responsible for repairs, the Supreme Court of New Jersey holds that the *inhabitants of counties* in that state are not indictable for not repairing bridges over rivers; nor at common law were they so indictable for not repairing bridges over canals. The court enters a *caveat* against "acquiescing in the *dicta* in the books," asserting a doctrine which would make the inhabitants of townships or the board of freeholders indictable for the non-repair of bridges.[1] Under a statute investing the county commissioners "with a general superintendence over the public roads," prescribing their duties and the manner of raising means, and also providing for the indictment of the commissioners for "palpable omission of duty," no prosecution can, in the opinion of the Supreme Court of Illinois, be sustained, unless there was a palpable omission of duty imperatively required by law, in a matter involving no discretion, or a wilful and corrupt, as well

1854, where a town was held indictable for neglecting to keep in repairs a bridge and abutments erected by a *railroad company* over a railroad where it crosses the public highway. The *primary* liability under the statute, as respects the public, was considered as resting upon the town rather than upon the railroad company, the latter, however, would be liable to the towns, which could enforce such liability by *mandamus* to compel the railroad companies to keep such bridges as the law requires them to maintain, in repair. See Cambridge *v.* Charlestown Railroad Company, 7 Met. 70; Rex *v.* Birmingham &c. Railroad Company, 9 Car. & P. 469. *Or by indictment:* Rex *v.* Inhabitants of Oxfordshire, 16 East, 223. Or, if money be expended by the town in necessary repairs, by *an action on the case.* Further, as to liability of towns for defects in railroad bridges erected on a public highway, see Sawyer *v.* Northfield, 7 Cush. 490, where, under the statute of Massachusetts, a different conclusion was reached. Under the statute of the latter state, the liability of the town is qualified, and does not exist where the turnpike, or bridge, or railroad company, is bound, by law or charter, to keep the roads and bridges built by them in repair, in which case they, and not the towns, are liable for neglect of this duty: See, further, *ante*, Sec. 560, and note. *Post*, Chap. XXIII.

[1] State *v.* Hudson County, 1 Vroom (N. J.), 137, 1862. The opinion in this case, by *Vredenburgh*, J., was evidently prepared with much care, and is highly interesting.

as palpable, neglect of a discretionary duty, mere error of judgment or departure from sound policy not being sufficient where the defendants are vested with a discretionary power.[1]

[1] Eyman *et al. v.* People, 1 Gilm. (Ill.) 8 (neglecting to repair bridge). Further, as to *Bridges*, see Chap. XVIII. on Streets, *ante*, Sec. 579; Chap. XX. on *Mandamus*, Sec. 673. *Post*, Chap. XXIII.

CHAPTER XXIII.

Civil Actions and Liabilities.

Actions on Contracts—Secs. 749–751.

1. Liability on Contracts—*Ultra Vires* as a defence—Sec. 749.
2. Liability on *Implied Contracts*, generally—Sec. 750.
3. For *Illegal Taxes*, &c., compulsorily collected—Sec. 751.

Actions for Torts—Secs. 752–802.

4. No liability in respect to *the exercise of discretionary* or *legislative powers*—Sec. 753.
5. Nor for *imperfect execution* of by-laws—Sec. 754.
6. Nor for *misconstruing* extent of public powers—Sec. 755.
7. Nor, without a statute creating it, for *buildings demolished* to prevent *fire*—Secs. 756–759.
8. Nor for property destroyed by *mobs*—Sec. 760.
9. Implied liability for *neglect of corporate duty*—Secs. 761, 778, 779.
10. *Distinction* in this respect between *quasi* corporations and municipal—Secs. 761–765.
11. Liability for *torts of officers and agents*—Sec. 766.
12. Not liable for acts *ultra vires*—illustrations—Secs. 767, 768.
13. But liable for *authorized torts* not *ultra vires*—Secs. 769–771.
14. *Respondeat Superior*, when applicable—Secs. 772–778.
15. *Respondeat Superior:* Who are, and who are not, *corporate* officers—Secs. 773–777.
16. Liability for *neglect of corporate duty*—Secs. 761, 778, 779.
17. Liability in capacity of *property* owner—Sec. 780.
18. No liability for *acts authorized* by charter or statute—Sec. 781.
19. *Streets.*—May *grade* and *change grade* of streets—Secs. 782, 783.

20. *Streets.*—*Remedy* therefor, if given, must be followed—Sec. 784.

21. *Streets.*—Liability for *unsafe streets* and sidewalks—Sec. 785, *et seq.*

22. *Defective Highways.*—*New England statutes and decisions* on this subject—Secs. 786–788.

23. *Streets.*—General liability of *municipal corporations proper* for unsafe streets—Secs. 789–793.

24. *Streets.*—Liability of *author of defect* or obstruction—Secs. 794, 795.

25. *Streets.*—Defects caused by *railroads*—Sec. 796.

26. *Streets.*—Liability as to *water courses* and *surface water*—Secs. 797–800.

27. *Streets.*—*Drains and Sewers*—liability in respect to—Secs. 801, 802.

Actions on Contracts.

§ 749. Municipal corporations are subject to be sued upon contracts and in tort. In a previous chapter we have considered at length the authority of such corporations to make contracts, the mode of exercising, and the effect of transcending the power.[1] This leaves but little to add in this place respecting their liability in actions *ex contractu*. Upon authorized contracts—that is upon contracts within the scope of the powers of the corporation and made by the proper officers or agents—they are liable in the same manner, and to the same extent, as private corporations or natural persons. But upon contracts which are *ultra vires* in the strict sense of that expression, that is upon those relating to matters wholly outside of the legal powers of the corporation, there is no liability; and the corporation is not estopped to set up the defence.[2] Nor,

[1] *Ante*, Chap. XIV. on Contracts, Sec. 370, *et seq.*

[2] *Ante*, Sec. 381, and cases cited. Further, as to *ultra vires*, see *post*, Secs. 766, 767, 768; also, Buffett *v.* Railroad Company, 40 N. Y. 168, and note; Grigg *v.* Foote, 4 Allen, 195; Pearce *v.* Railroad Company, 21 How. (U. S.) 441, 1858. The subject is well examined and the different senses in which the term *ultra vires* is used is stated by *Sawyer*, C. J., in the Miners' Ditch Company *v.* Zellerbach, 37 Cal. 543, 1869.

A useful article on *ultra vires*, or, How far corporations are liable for acts not authorized by their charters, will be found in 5 *American Law Review*

as we have before stated, is it bound by contracts within the scope of its chartered powers, if made by officers or agents not thereunto duly authorized.[1]

§ 750. Municipal corporations are liable to actions of *implied assumpsit.* The principles governing such liability have already been referred to.[2] Some additional illustrations of it may be here appropriately noticed. Thus, if the officers or agents of a municipal corporation, acting under ordinances which are void, make sales and deeds of corporate property, which pass *no* right to the purchaser, and can never ripen into

(January, 1871), 272, in the form of a note to the opinion of *Jervis*, C. J., in The East Anglian Railway Company *v.* The Eastern Counties Railway Company, 11 C. B. 775, 21 L. J. (N. S.) C. P. 23, 16 Jur. 249, selected because "one of the earliest and most constantly cited of the many cases on the subject, and, after being much criticised, has been followed in the latest English adjudications." After referring to numerous English and American cases, the writer thus states his judgment of the result: "We gather from the cases which have been cited, and from others, that when a corporation is created by a public statute for definite and limited objects, to which its funds are to be applied, a contract which is entirely unconnected with those purposes, or which, on its face, will cause the funds to be applied to other objects, is illegal and void"—citing the cases: * * * "The question whether a particular contract is binding on a particular corporation or not, is to be answered by determining whether, on a fair construction of the charter, it relates to matters connected with the corporate powers and duties. * * * When an act in its external aspect is within the general powers of the company, and is only unauthorized because it is done with a secret, unauthorized intent, the defence of *ultra vires* will not prevail against a stranger who dealt with the company without notice of such intent." *As to effect of having notice:* Ebbw Vale Co. L. R. 8 Eq. 14; 5 Am. Law Rev. 283, note. *Estoppel: Ib.* 275, and cases cited.

[1] *Ante*, Chap. XIV. Secs. 372, 381, 419–426. The city council of a city authorized to borrow money and issue its bonds therefor, ordered its officers *to insert on the face of certain bonds the consideration;* the officers failed to do it, and the bonds, negotiable in form, came into the hands of *bona fide* holders, and it was held that the city was *responsible for the acts and omissions* of its officers in this respect, and was bound to pay—the court regarding the directions to the officers not a limitation on their powers, but in the nature of private instructions: De Voss *v.* Richmond, 18 Gratt. (Va.) 338, 1868. The opinion of *Joynes*, J., in this case, treats the power of the corporation to borrow money as one of its *private, and not public* or governmental, powers.

[2] *Ante*, Secs. 383–387; Township *v.* Township, 11 Iowa, 506, and cases cited; Lemington *v.* Blodgett, 37 Vt. 215.

a title, and receive the purchase money and place the same into the treasury of the corporation, which *appropriates* the money to its own use by virtue of ordinances or resolutions legally adopted, the purchaser may recover back the purchase money, and the sale being void, he need not make or tender a reconveyance before bringing his action.[1] So a purchaser from a city corporation of its bonds, which are *wholly void for want of power to issue them*, may recover back from the city the money paid, as upon a failure of consideration; and in such case, the bonds being void, it was even held not to be necessary for the plaintiff to offer to return them before bringing suit, it being sufficient to produce them at the trial to be surrendered.[2]

§ 751. An important class of actions in form *ex contractu* remains to be noticed. We refer to actions against municipal corporations *to recover back money paid to them for taxes.* They are usually brought in *assumpsit* for money had and received, are equitable in their nature, and lie for money actually paid

[1] The principle stated in the text was settled, after great consideration, by the Supreme Court of California, in an interesting series of cases known as the "City Slip Cases:" *Ante*, Sec. 447; McCracken *v.* San Francisco, 16 Cal. 591, 1860; Grogan *v.* San Francisco, 18 Cal. 590, 1861; Piemental *v.* San Francisco, 21 Cal. 351, 1863, where Mr. Chief Justice *Field* reviews the previous cases, and sums up the propositions they establish. See, also, Saterlee *v.* San Francisco, 23 Cal. 314, 1863; Herzo *v.* San Francisco, 33 Cal. 134, 1867. In this last case the principle stated above was re-affirmed, but it was held that the city would not be liable simply by reason of the receipt and retention of the money by its officers or the treasurer; that an appropriation by the city is necessary, which could only be by a valid ordinance; and hence where the appropriation was by virtue of an ordinance which was void, because not passed as required by the charter, the city is not liable, even if the money has been applied in payment of its debts. This last decision was participated in by part of the court only, and it is not clear to our mind that it does not lay down too strict a rule as to the necessity of a valid ordinance to constitute such an *appropriation* or *conversion* of the money, as will make the city liable to refund: See Dill *v.* Wareham, 7 Met. (Mass.) 438.

As to liability of COUNTIES *on implied contract:* Alton *v.* Madison County (pauper), 21 Ill. 115, 1859; Walcott *v.* Lawrence County (denying such liability under statute of Missouri), 26 Mo. 272; Aldrich *v.* Londonderry (paupers), 5 Vt. 441; 17 *ib.* 79, 447; Lehigh County *v.* Kleckner (erecting county bridge), 5 Watts & Serg. 181.

[2] Paul *v.* Kenosha, 22 Wis. 266, 1867. *Ante*, p. 377, note [2].

to the defendant, and which it is against equity and good conscience he should retain. If a tax has been levied upon the plaintiff's property, and if that property is subject to the tax, the amount is justly and equitably due, and cannot, for any mere irregularities in the detail or mode of proceeding, be recovered back. Actions of this description against a municipal corporation are, upon principle and the weight of authority, maintainable when, and in general, only when, the following requisites co-exist: 1. The authority to levy the tax must be *wholly wanting*, or the tax itself wholly unauthorized; in which cases the assessment is not simply irregular, but *absolutely void.* 2. The money sued for must have been *actually received* by the defendant corporation, and received by it for *its own use*, and not as an agent or instrument to assess and collect money for the benefit of the state, or other public corporation or person. And 3. The payment by the plaintiff must have been made *upon compulsion*, to prevent the immediate seizure of his goods or the arrest of the person, *and not voluntarily.* Unless these conditions concur, *paying under protest* will not give a right of recovery. The same principles are applicable to actions for the recovery back of money paid for *illegal license taxes or fines* imposed by a municipal court.[1] Nor is a town or city liable

[1] Lincoln *v* Worcester (city of), 8 Cush. 55, 1851. The opinion in this case is by *Shaw*, C. J., and the general subject is fully and ably examined, and the prior cases in Masschusetts reviewed, commented on, and distinguished. If it cannot be inferred that the propriety of such actions is to be doubted in any case, it is clearly insisted upon that they should be limited to cases where the plaintiff brings himself within *all* of the conditions stated in the text: *Ante*, p. 236, Sec. 204; McKee *v.* Town Council (municipal fine), Rice (South Car.), Law, 24, 1838; Marriott *v.* Hampton, 2 Esp. 546; S. C. 2 Smith's Leading Cases, 237.

In Howell *v.* Buffalo, 15 N. Y. 512, 1857, and Bennett *v.* Buffalo, 17 *ib.* 383, *actions of tort* were maintained for the trespass of the officers of the corporation in seizing bank bills to pay void assessments upon the plaintiffs.

The tax or assessment must be illegal and void, and not simply irregular, as defects in mode of assessment, over-valuation, etc., to authorize its recovery back: Sumner *v.* First Parish, 4 Pick. 361; Stetson *v.* Kempton, 13 Mass. 272; Osborn *v.* Danvers, 6 Pick. 98; Preston *v.* Boston, 12 Pick. 7; Boston Water Power Company *v.* Boston, 9 Met. 199; Howe *v.* Boston, 7 Cush. 273; Powers *v.* Sanford, 39 Maine, 183; Wright *v.* Boston, 9 Cush. 233; Lee *v.* Tempelton, 13 Gray, 476; Cook *v.* Boston (money paid for license), 9 Allen, 393; Boston *v.* Monroe, 7 Cush. 125. The validity of a meeting called by a committee *de facto* cannot be inquired into in an action by an inhabitant against

to a tax-payer for his proportion of illegal expenses which the

the public corporation to recover back a tax: Williams *v.* School District, 21 Pick. 75, 1838. *Ante*, Secs. 204, 214, 716, note, as to acts of *de facto* officers, and void assessment of taxes. As to recovery back of money from city *after payment on execution* in cases where the court had, and also where it had not, jurisdiction to render judgment: Gordon *v.* Baltimore, 5 Gill, 231; McKee *v.* Town Council, Rice (South Car.), Law (fine),24, 1838.

The payment must not have been voluntarily made, but made upon compulsion. Where made to prevent or free himself from arrest, or to prevent a levy upon goods under warrant or other process, the law considers the party in duress, and he may recover it back if not liable: *Ib.*; Preston *v* Boston, 12 Pick. 7; Boston, &c. Glass Company *v.* Boston, 4 Met. 181; Powers *v.* Sanford (distress), 39 Maine, 183; Haines *v.* School District (duress:arrest), 41 Maine, 246; Cook *v.* Boston, 9 Allen, 393. *Per Perkins*, J., in Jenks *v.* Lima Township, 17 Ind. 326, 1861, and cases cited; Allentown *v.* Saeger, 20 Pa. St. 421; Silliman *v.* Wing, 7 Hill (N. Y.), 159; Oates *v.* Hudson, 5 Eng. L. and Eq. 469, note; Elliott *v.* Swartout, 10 Pet. 137.

Money voluntarily paid to a corporation, without fraud or imposition for an illegal tax, license, or fine, cannot—there being no coercion, no ignorance or mistake of facts, but only ignorance or mistake of the law—be recovered back from the corporation, either at law or in equity, even though such tax, license, fee, or fine could not have been legally demanded and enforced: *Ib.;* Robinson *v.* City Council, 2 Rich. (South Car.) Law, 317, 1846; Smith *v.* Hutchinson, 8 *ib.* 260, 1855; Elston *v.* Chicago (void special assessment), 40 Ill. 514, 1866. The doctrine that in such cases *there is no implied assumpsit* is carefully examined and vindicated by *Carr*, J., and *Tucker*, Prest., in the opinions pronounced by them in Richmond (city of) *v.* Judah, 5 Leigh (Va.), 305, 1834, and which will repay perusal. Same principle: See, also, the full and able opinion of *Walker*, C. J., in Town Council *v.* Burnett, 34 Ala. 400, 1859, and cases cited; Christy's Administrators *v.* St. Louis, 20 Mo. 143, 1854; Walker *v.* St. Louis, 15 *ib.* 563; Smith *v.* Readfield, 27 Maine, 145.

The same doctrine has been applied to money paid under an *unconstitutional act* of the legislature and ordinances passed in pursuance thereof, the court adopting the principle that money voluntarily paid under a mistake of legal right cannot be recovered back, and that *mere apprehension* of an impending distress warrant did not make the payment a compulsory one: Baltimore *v.* Lefferman, 4 Gill (Md), 425, 1846, where *Martin*, J., adverts to the leading authorities, and deduces from them rules substantially the same as those stated in the text Approved, Morris *v.* Baltimore 5 Gill (Md.), 244. See, also, Gordon *v.* Baltimore, *ib.* 231. S. P. Taylor *v.* Board of Health, 31 Pa. St. 73, holding that a *threat to use legal remedies* to collect does not make the payment compulsory.

What constitutes compulsory payment: Where a person, *on his own motion*, goes to the city clerk and *pays* money as the price of *a license*, under an ordinance afterwards judicially declared void, the payment is voluntary, and not upon compulsion, although the ordinance imposed a fine and imprisonment, as a penalty for not obtaining a license; hence, in such cases, the money cannot be recovered back in an action against the corporation: Town Council, &c. *v.* Burnett, 34 Ala. 400, 1859.

corporate authorities may have incurred and paid out of money

In Ohio the doctrine is judicially asserted that money will be deemed to have been paid compulsorily not only where the payment was made to release person or property from detention, but also in cases *where the parties do not stand on an equal footing*, and where the one party, before he would perform a duty enjoined on him by law, illegally compelled or required the other to pay a sum of money to induce or secure such performance: Baker *v.* Cincinnati, 11 Ohio St. 534, 1860, action to recover money paid for theatre license "*under protest;*" qualifying and explaining Mays *v.* Cincinnati, 1 *ib.* 268. So, where a county court gave notice that they would grant a certain ferry to the person who would donate the largest sum to the county, and in accordance therewith, the then holder of the franchise bid the sum of $500, which, in an action against the county, he was allowed to recover back, on the ground that the county authorities had, under the statute, no right to impose any such condition or restriction upon the grant: County *v.* Simmons, 5 Gilm. (Ill.) 516. As to liability of *county* for a *fine* paid, to it: Cook *v.* Freeholders, 2 Dutch. (N. J.) 326. So, also, in the same state it is decided that a *payment is not voluntary if the collector has a warrant* by virtue of which he may levy and sell, and this is exhibited to the person paying by the collector; the party in that state not being entitled in such case to replevy personal property: Bradford *v.* Chicago, 25 Ill. 412, 1861.

Money compulsorily paid to a city on a *void assessment* for the purpose of opening a street may be recovered back, the right to such recovery being especially clear, if the improvement be abandoned by the corporation: Bradford *v.* Chicago, 25 Ill. 412, 1861. So, *it seems*, that if in such case the money is voluntarily paid, it may be recovered back, as on the *ground of a total failure of consideration*, when the scheme of *the improvement* for which the money was collected *has been abandoned*, or is unreasonably delayed by the corporate authorities: *Ib. Ante*, Secs. 473–475. In *Kentucky* it is held that an action lies to recover money paid under a clear and palpable *mistake of law or fact*, and when in law, honor, or conscience, it was not due: Louisville *v.* Henning, 1 Bush, 381, 1866. What is such a mistake? *Ib.*; Noble *v.* Bullis, 23 Iowa, 559; Ripon *v.* School District, 17 Wis. 83.

Rules of the civil law and provisions of the Louisiana Code on this subject, which are not entirely coincident with the English and American jurisprudence: See Worsley *v.* Municipality, 9 Rob. (La.) 324, 1844, relating to *wharfage* illegally collected, and Catholic Society *v.* New Orleans, 10 La. An. 73, as to recovery back of taxes assessed upon *exempt property* and voluntarily paid.

Cases showing when the payment is deemed compulsory, and when voluntary: Preston *v.* Boston, 12 Pick. 7; Ashley *v.* Reynolds, 2 Stra. 916; Bank *v.* New Orleans, 12 La. An. 42; Louisville *v.* Zanone, 1 Met. (Ky.) 151; Baltimore *v.* Hefferman, 4 Gill (Md.), 432; Morris *v.* Baltimore, 5 Gill (Md.), 248; Walker *v.* St. Louis, 15 Mo. 574; Glass Company *v.* Boston, 4 Met. (Mass.) 181, 188; Town Council *v.* Burnett, 34 Ala. 400, 1859, and cases cited; Philadelphia *v.* Cooke, 30 Pa. St. 56; Allentown *v.* Sæger, 20 Pa. St. 421; Robinson *v.* Charleston, 2 Rich. (South Car.) 317; Dew *v.* Parsons, 18 Eng. Com. Law, 87; Col-

raised by taxes.[1] The principle has been held to apply to municipal or public corporations, as well as to individuals, that money *voluntarily* paid under a claim of right, there being no fraud or mistake of *fact*, although the payor is mistaken in point of law as to his legal liability, is not recoverable back.[2] Thus, where a board of supervisors acting for a county have power "to examine, settle, and allow" all accounts chargeable against the county, their allowance and settlement is binding upon the county, so as to preclude it from recovering back money paid pursuant thereto.[3] But before payment, the county may, in the author's judgment, defend, notwithstanding the allowance, if not liable in law.[4]

Actions for Torts.

§ 752. We find it impossible to state, by way of definition, any rule so precise as to be of much practical value which will *precisely* embrace the torts for which a private action will lie

well *v.* Piden, 3 Watts (Pa.), 327, 328; County, &c. *v.* Simons, 5 Gilm. (Ill.) 513; Elliott *v.* Swartout, 10 Pet. (U. S.) 150; Clark *v.* Dutcher, 9 Cow. 674; Leonard *v.* Canton (license), 35 Miss. 189, 1868; Harvey *v.* Olney, 42 Ill. 336, 1866; Elston *v.* Chicago (special assessment), 40 Ill. 514, 1866; Cook *v.* Boston (license), 9 Allen, 393; Mylert's Executors *v.* Sullivan County, 19 Pa. St. 181.

Under protest.— Merely paying under protest does not make the payment a compulsory one: Lee *v.* Templeton, 13 Gray, 476.

As to payment under protest.— Effect of these words: Baker *v.* Cincinnati, 11 Ohio St. 534, 1860; Jenks *v.* Lima Township, 17 Ind. 326, 1861; Taylor *v.* Board of Health, 31 Pa. St. 73; Valpey *v.* Manley, 1 C. B. 592; Parker *v.* Railroad Company, 7 M. & G. 253; 4 Met. 181; Allentown *v.* Sæger, 20 Pa. St. 421; Cook *v.* Boston, 9 Allen, 393; Grim *v.* School District, 57 Pa. St. 433, 1868.

Legalization of the illegal tax by the legislature before it is recovered back, will defeat the action: Grim *v.* School District, 57 Pa. St. 433, 1868. *Ante*, Chaps. IV. XIX. as to extent of legislative power.

Enjoining collection of illegal taxes: See, *ante*, Secs. 737, 738.

[1] Washington *v.* Harvard, 8 Cush. 66, 1851; *ante*, Sec. 732; New London *v.* Brainard, 22 Conn. 552, 1853.

[2] Marriott *v.* Hampton, 2 Esp. 546; S. C. Smith's Leading Cases, 237; Clarke *v.* Dutcher, 9 Cowen, 674: Mowatt *v.* Wright, 1 Wend. 355; 2 Denio, *infra*, 26, and cases cited on page 40.

[3] Supervisors *v.* Briggs, 2 Denio, 26, 1846; S. C. 2 Hill (N. Y.), 135; followed, Smelson *v.* State, 16 Ind. 29.

[4] *Ante*, Sec. 406; Sec. 411, and note; Sec. 412.

against municipal corporations. The difficulty experienced by the courts on this subject has been often confessed, and speaking of it, Mr. Justice *Foote* remarks: "All that can be done with safety is to determine each case as it arises."[1] It is very justly observed in Mersey Dock Cases[2] (relating to the liability of a public corporation required to maintain suitable docks and harbor accommodations, for the use of which they were authorized to demand certain dues), "that in every case the liability of a body created by statute must be determined under a true interpretation of the statutes under which it is created." We can, perhaps, most satisfactorily ascertain the state of the law respecting the liability of municipal corporations in actions for torts, by referring to, and, as far as possible, classifying, the cases (which may be grouped according to the subject matter) in which such liability has been judicially asserted or denied. And first, we will mention certain cases in which these corporations are *not liable* to civil actions, unless the liability be expressly created by statute.

§ 753. A municipal corporation is not liable to an action for damages either for the non-exercise of, or for the manner in which in good faith it exercises, *discretionary powers* of a public or legislative character. So, where such a corporation has a discretion as to the time and manner of making corporate improvements, as for example, grading streets, making sewers, drains, vaults, etc., building market houses, improving its harbor, and the like, neither *mandamus* nor a private action will lie against the corporation for *omitting or neglecting* to act; and the reason is, that such powers are conferred to be exercised or not, as the public interest is deemed to require, and there is no implied liability for deciding either that the public interest does not require action, or that it requires action in a particular way.[3] There

[1] Lloyd *v.* Mayor, &c. of New York, 1 Seld. 369, 375, 1851.

[2] Mersey Docks *v.* Gibbs; Same *v.* Penhallow, Law R. 1 H. L. Cases, 93; S. C. 1 H. & N. 439; 3 *ib.* 164, approved by *Rives*, J., in his learned opinion in Richmond *v.* Long's Administrators, 17 Gratt. (Va.) 375.

[3] Wilson *v.* Mayor, &c. of New York, 1 Denio, 595, 1845. Followed, Cole *v.* Medina, 27 Barb. 218, 1858; Lacour *v.* Mayor, &c. of New York, 3 Duer, 406, 1854. *Post*, Secs. 800–802; White *v.* Yazoo City, 27 Miss. 357, 1854; Griffin *v.* Mayor, 9 N. Y. 456, 1853, and cases cited; followed, Dewey

may be, however, as elsewhere shown, an implied liability for the negligent or unskillful manner in which *strictly corporate powers*, as distinguished from *public powers*, are carried into execution, although there was no perfect duty resting on the corporation to enter upon the works or undertakings involving the exercise of such powers.[1] But the liability in such cases attaches only when the duties cease to be judicial in their nature, and become purely ministerial.[2]

§ 754. Unless there be a valid contract creating, or a statute declaring, the liability, a municipal corporation *is not bound to provide for and secure a perfect execution of its by-laws*, and it is not responsible in a civil action for the neglect of duty on the part of its officers in respect to their enforcement, though such neglect result in injuries to private persons which would otherwise not have happened.[3]

v. Detroit, 15 Mich. 307, where the council had a discretion as to the number of subordinate officers it would appoint: Western College *v.* Cleveland, 12 Ohio St. 375, 1861; Carr *v.* Northern Liberties (authority to construct sewers), 35 Pa. St. 324, 1860; Bennett *v.* New Orleans, 14 La. An. 120, 1849; Cooley, Const. Lim. 208. *Infra*, Sec. 760; Kelly *v.* Milwaukee (damage by swine at large), 18 Wis. 83, 1864; Joliet *v.* Verley, 35 Ill. 58, *per Beckwith*, J.; Goodrich *v.* Chicago, 20 Ill. 445, 1859, in which it was held where a city corporation had, among other powers, express authority "*to remove all obstructions in the harbor*," that it was not liable to a party who received damages from a sunken hulk therein, if the city had never undertaken to exercise the power granted to it to clear out the harbor. If, however, says *Caton*, C. J., the city had entered upon the work of removing the hulk, and in doing so had carelessly left it in an exposed situation, by reason of which a navigator's vessel was injured, it would be liable for such negligence: See, on this point, *infra*, Secs. 772–778; Mayor, &c. *v.* Furze, 3 Hill (N. Y.), 612, explained in Wilson *v.* Mayor, &c. 1 Denio, 595, 600, and in Mills *v.* Brooklyn, 32 N. Y. 489, 1865, cited *infra*, Sec. 801; Dayton *v.* Pease, 4 Ohio St. 80, 1854.

As to mandatory and discretionary powers, see ante, Secs. 62, 669, 689. *Post*, Secs. 800, 801, 802.

[1] *Post*, Secs. 755, note, 778, 789, 790, 802.

[2] *Post*, Sec. 802.

[3] Levy *v.* The Mayor, &c. of New York, 1 Sandf. S. C. R. 465, relating to injury committed by swine running at large in the streets in violation of by-laws, cited with approval, 11 N. Y. (1 Kern.) 396, and see cases there cited, and in Griffin *v.* The Mayor, &c. of New York. 9 N. Y. (5 Seld.) 456, 459, *per Denio*, J. S. P. Peck *v.* Austin (market ordinance), 22 Texas, 261, 1858, in which the court, admitting that such a corporation may be liable for "the

§ 755. A municipal corporation is not liable to a private individual for losses caused by its having *misconstrued the extent of its powers*, and issued a license which it had no authority to grant.[1] The license in the case just cited from the United States Supreme Court[2] was granted by the corporation, without authority therefor, to a person to exercise the trade of auctioneer, and the plaintiff having sustained losses from his fraudulent conduct, brought an action against the city, the injury alleged in the declaration being an omission by the city to take a bond, as required by law, and the corporation having no authority to require or take such a bond, it was held that the action could not be maintained. The court observed that the auctioneer was not "the officer or agent of the corporation, but acted for himself, as entirely as a tavern keeper or other person who carries on any business under a license from the corporate body." The proposition may, we think, be affirmed as unquestionably sound, that the licensees of a municipal corporation to exercise any independent trade or business for their own profit are not the officers or agents of the corporation so as to make it liable, on the principle of *respondeat superior*, for their conduct.

wrongful acts of its officers done under its authority, and in pursuance to its will, express or implied," say that "Such a rule cannot be enforced in this case, because the act, or non-action, of the officers complained of, was contrary to the will of the corporation as expressed in the ordinance." See, also, observations (*arguendo*) of *Marshall*, C. J., in Fowle *v.* Alexandria, 3 Pet. 398, 409, 1830; Lorrillard *v.* Monroe, 11 N. Y. (1 Kern.) 392, 396, 1854, affirming S. C. 12 Barb. 161. As to who are *corporate officers*, and what are *corporate duties*, see *infra*, Secs. 755, 758, 772–778, 800, 802.

As to contract to enforce ordinances, see Le Claire *v.* Davenport, 13 Iowa, 210. *Ante*, Sec. 318.

[1] Fowle *v.* Alexandria, 3 Pet. 398, 1830. S. C. below, 3 Cranch, C. C. 70. *Ante*, Secs. 381, 749. *Infra*, Sec. 766. Nor is a municipal corporation liable for the act of its council in *erroneously*, but without any corruption or malice, *refusing to grant a retail license*, by mistake supposing it had discretion over the subject, when in fact it had none. The exemption from liability is placed by the court upon the ground that such functions are substantially judicial in their nature: Duke *v.* Rome, 20 Ga. 635, 1856; White *v.* Yazoo City, 27 Miss. 357, 1854. *Supra*, Sec. 753. *Post*, Sec. 801.

[2] Fowle *v.* Alexandria, *supra*. In Cole *v.* Nashville, 4 Sneed (Tenn.), 162, 1851, arising on demurrer to the declaration, it was properly held that as the municipal corporation had *no jurisdiction over lunatics*, and no power and no duty to arrest and confine them, or to take measures for this purpose, it

§ 756. The rights of private property, sacred as the law regards them, are yet subordinate to the higher demands of the public welfare. *Salus populi suprema est lex.* Upon this principle, *in cases of imminent and urgent public necessity, any individual or municipal officer may raze or demolish houses and other combustible structures* in a city or compact town, to prevent the spreading of an existing conflagration. This he may do independently of statute, and without responsibility to the owner for the damages he thereby sustains. The ground of this exemption from liability is the *public necessity*, the public good, and therefore, if the public good did not require the act to be done —if the act was not apparently and reasonably necessary— the actors can not justify, and would be responsible.[1]

could not be made liable for a *supposed omission of duty* for not doing so *Post*, Sec. 766. But in the same case it was also decided that if such a corporation, or it officers, *knowing that a person was a lunatic, granted him a license to carry on a dangerous avocation*, as that of a druggist, it was liable in damages to a party injured by such person while in pursuit of the business for which he was thus licensed. This decision was based upon the ground that the injury which happened was a natural and probable result of the power granted, and that such corporations are liable for the wrongful acts and neglect of their officers in the course, and within the scope, of their employment. But was the act of granting a license to a druggist a *corporate* act? Was it not rather a public power to be exercised by the corporation as a public agency of the state? And if so, the acts or neglect of the officers would impose no liability on the corporation: *Ante*, Sec. 39. *Post*, Secs. 758, 768, 772–778.

[1] Mouse's Case, 12 Co. 63; *ib.* 13, where Lord *Coke* says: "For the commonwealth, a man shall suffer damage; as for the saving of a city or town, a house shall be plucked down if the next be on fire. This every man may do, without being liable to an action." Maleverer *v.* Spink, 1 Dyer, 36, *b;* Governor, &c. *v.* Meredith, 4 T. R. 797, *per Buller*, J.; Respublica *v.* Sparhawk, 1 Dallas, 337, and authorities cited by *McKean*, C. J. "We find, indeed, a memorable folly recorded in the third volume of Clarendon's history, where it is mentioned that the lord mayor of London, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down of forty wooden houses, or to removing the furniture, &c., belonging to the lawyers of the temple, then on the circuit, for fear he should be answerable for a trespass; and in consequence of this conduct half of that great city was burned:" *Ib.;* 15 Vin. Abr. title "*Necessity*," pl. 8; 2 Kent, Com. 338; Taylor *v.* Plymouth, 8 Met. 462, 465, 1844, *per Shaw*, C. J.; Mayor, &c. of New York *v.* Lord, 18 Wend. 126, affirming S. C. 17 Wend. 285, 1837; Conwell *v.* Emrie, 2 Ind. (Cart.) 35, 1850. See, also, the interesting cases of the American Print Works, 3 Zabr. (N. J.) 590, 1851, affirming S. C. *ib.* 9; and see S. C. on former appeal, 1 Zabr. 248; *ib.* 714, which arose out of the great fire of 1835, in the city of New York.

§ 757. Municipal corporations, or certain officers thereof, are sometimes appointed, by charter or statute, "*agents to judge, of the emergency* and direct the performance of acts which any individual might do at his peril, without any statute at all."[1] And, by statute or charter, such corporations are not unfrequently made liable for damages which individuals may sustain for buildings or property which are destroyed under the direction of the proper officers, to prevent the extension of a fire. *The liability of the municipal corporation in such cases is purely statutory*, and hence, in order to charge it, the case must be clearly and fairly within the enactment.[2] Thus, where the statute allows such a recovery only when a building is demolished by the order of *three* fire wards or directors, a destruction of it by the order or direction of one of these officers creates no liability against the corporation; and a *by-law* authorizing one to exercise, in urgent cases, the powers of the three, was adjudged void.[3]

[1] People *v.* Winnehammer, 12 How. (Pr. Rep. Court App.) 260, *per Comstock*, J.; S. P. *per Selden*, J., *ib.* 274; Russell *v.* Mayor of New York, 2 Denio, 461, 474, 1845, opinions of *Sherman* and *Porter*, Senators. *Infra*, Sec. 772, note.

[2] Taylor *v.* Plymouth, 8 Met. 462, 465; Hafford *v.* New Bedford, 16 Gray, 297; McDonald *v.* Red Wing, 13 Minn. 38, 1868; Sarocco *v.* Geary, 3 Cal. 69; Dunbar *v.* San Francisco, 1 Cal. 355, 1850; Wheeler *v.* Cincinnati, 19 Ohio St. 19; Western College *v.* Cleveland, 12 Ohio St. 375, 1861, *per Gholson*, J.; Fisher *v.* Boston, 104 Mass. 87. *Contra:* Bishop *v.* Macon, 7 Ga. 200, 1849; but the subject of *corporate* liability for the act of mayor and council in ordering the destruction is not distinctly discussed. *Lumpkin*, J., seems erroneously to suppose or assume that there is an implied *assumpsit* on the part of the city for the destruction of such property as might otherwise have been saved to the owner.

[3] Coffin *v.* Nantucket, 5 Cush. 269, 1850. Note remarks of *Metcalf*, J., 272, as to whether a *majority* of the fire wards or directors could lawfully authorize the destruction of buildings. *Ante*, Secs. 221, 251. See, also, Ruggles *v.* Nantucket, 11 Cush. 433, 1853, on this point, and on the construction of the word "owner." As to the estate or interest necessary to justify recovery, and as to the right of recovery for *personal property* under the New York statute (2 Rev. Laws, 368), see Stone *v.* Mayor, &c. of New York, 25 Wend. 157, 1840, affirming S. C. 20 Wend. 139; Mayor, &c. of New York *v.* Lord, 18 Wend. 126; 17 *ib.* 285. *Insurance.*—It is held that the fact that the owner is insured does not affect the right of recovery or the amount to be recovered of the corporation. The *insurers* are entitled to be subrogated to all of the rights of the owner or assured, and to have applied on their pol-

§ 758. The city council of Charleston, acting under the general municipal powers of the city, and without any special statute creating a liability, adopted an ordinance authorizing the intendant, among other officers, in time of fire, to demolish such buildings "as may be judged necessary" by him to prevent the further spread of fire, thereby investing this officer with the power to judge whether the necessity existed. A fire being in progress, the plaintiff's house was blown up by the order of the intendant, and the fire was subsequently extinguished before it reached his house, and he brought his action of trespass against the city, claiming that the property had been destroyed by the intendant without necessity, and that the ordinance authorizing the intendant to destroy the property for the benefit of the city, was sufficient to charge the *city corporation* in case the plaintiff established that the destruction was unnecessary, and that the discretion of the officer had been abused. The court decided that the plaintiff could not recover, placing its judgment upon the broad ground that the city, being a public corporation, was not liable to an action by individuals, unless it be given by statute.[1]

§ 759. As one whose property has been destroyed by the order of the public authorities, for the public benefit, has a strong natural equity for compensation, and as *statutes making*

icies the amount received by him from the corporation: Mayor, &c. of New York *v.* Pentz, 24 Wend. 668, 1840. And see Pentz *v.* Ætna Insurance Company, 9 Paige, 568; City Fire Insurance Company *v.* Corlies, 21 Wend. 367. *Interest.*—Interest on the amount should be allowed from time of destruction: Mayor, &c. *v.* Pentz, 24 Wend. 668; 25 *ib.* 157. But not intermediate the time of assessment and confirmation by the court: Lord *v.* Mayor, &c. of New York, 3 Hill, 426. *Evidence.*—The opinions of *bystanders* as to whether the buildings destroyed *would* have taken fire, not admissible; as to the opinion of *firemen*, *quære:* Mayor, &c. *v.* Pentz, 24 Wend. 668.

[1] White *v.* Charleston, 2 Hill (South Car.), 571, 1835. The result was right, but assuming the power to pass the ordinance, the decision should be placed, we think, upon the ground that the intendant was discharging a *public*, as distinguished from a *municipal* or *corporate*, duty, and is not in this matter to be regarded as the agent of the city, and therefore the city would not, on the principle of *respondeat superior*, be responsible for his acts: *Ante*, Secs. 39, 754; *post*, Secs. 772–778, 800–802; Fisher *v.* Boston, 104 Mass. 87; Hafford *v.* New Bedford, 16 Gray, 277; Wheeler *v.* Cincinnati, 19 Ohio St. 19.

the public corporation liable are remedial, while they are not to be strained to cover cases not fairly embraced by them, they are yet to be liberally expounded.[1] If the statute creating the liability against the corporation points out *the remedy*, that alone can be pursued. Hence if the statute provides for an assessment, a civil action will not lie against the corporation.[2] But if the statute gives the right and prescribes no specific remedy, an action may be brought.[3]

§ 760. Public or municipal corporations are under no common law liability to pay for the *property of individuals destroyed by mobs or riotous assemblages*;[4] but in such case, the *legislature*

[1] Mayor, &c. of New York *v.* Lord, 17 Wend. 285, 292, 1837, *per Nelson*, C. J.; affirmed, 18 Wend. 126; Mayor, &c. *v.* Pentz, 24 Wend. 668; Stone *v.* Mayor, &c. 25 Wend. 157. In Massachusetts it is held that the statute does not apply to a building which is pulled down by order of the public officers *after* it is so far burnt that it is impossible to save it: Taylor *v.* Plymouth, 8 Met. 462, 1844. And the New York statute does not impose a liability on the corporation for property which would inevitably have been destroyed by the fire: Pentz *v.* Ætna Insurance Company, 9 Paige, 568; Mayor, &c. of New York *v.* Lord, 17 Wend. 285.

[2] Russell *v.* Mayor, &c. of New York, 2 Denio, 461, 1845. Same principle: *Infra*, Sec. 784; *supra*, Secs. 653–656.

[3] Lowell *v.* Wyman, 12 Cush. 273, 276, 1853.

[4] Western College *v.* Cleveland, 12 Ohio St. 375, 1861. It was held in this case that a provision *inter alia* in the constituent act of the city that it "shall be the *duty* of the council to regulate the police of the city, preserve the peace, *prevent riots*, disturbances, and disorderly assemblages," had reference to the passage of ordinances to be enforced by officers appointed for the purpose, and did not make the city responsible for the riotous destruction of property, or the neglect of the officers of the city in not preventing such destruction: *Supra*, Sec. 753. See, also, Prather *v.* Lexington, 13 B. Mon. 559, 1852; Ward *v.* Louisville, 16 *ib.* 184, 1855. In these cases liability was sought to be grounded on the existence of power in the officers *to prevent and suppress mobs, and their failure and neglect of duty in this respect.* The court did not regard the omissions or acts of the executive officers of the city as imposing any liability on the city in her corporate capacity: Cheaney *v.* Hooser, 9 B. Mon. 330, 1848. In further support of the doctrine stated in the text, see, *supra*, Sec. 753. *In re* Pennsylvania Hall, 5 Pa. St. 204, 1847; Fauvia *v.* New Orleans (construing statute), 20 La. An. 410; Howe *v.* New Orleans, 12 La. An. 481; Baltimore *v.* Poultney (construing Maryland legislation), 25 Md. 107, 1866; Martin *v.* Mayor, &c. of Brooklyn, 1 Hill (N. Y.), 545, 551; Underhill *v.* Manchester (liability of towns under statute), 45 N. H. 214; Chadbourne *v.* Newcastle, 48 N. H. —; Bailey *v.* The Mayor, &c. 3 Hill, 531; Buttrick *v.* Lowell, 1 Allen (Mass.), 172; Ely *v.* Supv. 36 N. Y. 297.

may constitutionally give a remedy, and regulate the mode of assessing the damages.[1]

§ 761. In considering the subject of *the implied liability* of municipal corporations *to civil actions for misconduct or neglect on their part, or on the part of their officers, in respect to corporate duties*, resulting in injuries to individuals, it is essential, under the authorities, to bear in mind the distinction pointed out in a former chapter,[2] and to be noticed again hereafter,[3] between *municipal corporations proper*, such as towns and cities specially chartered or voluntarily organizing under general acts, and *involuntary quasi corporations*, such as townships, school districts, and counties (as these several organizations exist in most of the states), including therein for this purpose the peculiar organization, before referred to, known as the New England town.[4] The decisions of the courts in this country are almost uniform in holding the former class of corporations to a much more extended liability than the latter, even where the latter are invested with corporate capacity and with the power of taxation;[5] but respecting the *grounds* for this difference there is considerable diversity of opinion. The principle involved lies at the basis of a large class of actions against municipal corporations, and it is desirable briefly to examine it in the light of the adjudications which have established it. It may,

[1] Darlington *v.* Mayor, &c. of New York, 31 N. Y. 164, 1865, cited *ante*, Sec. 39, and notes. *In re* Pennsylvania Hall, 5 Pa. St. 204, 1847; Russell *v.* Mayor, &c. of New York, 2 Denio, 461, 1845; Lowell *v.* Wyman, 12 Cush. 273, 276, 1853. It is held, under the *statutes of Kansas*, that an action against a city, for damages resulting from the *killing* of a man by a mob should be brought in the *name of the personal representative* of the deceased: Atchison *v.* Twine, Supreme Court Kansas, 1872.

[2] *Ante*, Chap. II. Sec. 10, pp. 30–33; p. 82 Sec. 39.

[3] *Infra*, Secs. 762, 785, 789.

[4] *Ante*, Secs. 11–13, pp. 34–42.

[5] *Ante*, p. 30, Sec. 10, and note; Sec. 39; Soper *v.* Henry County, 26 Iowa, 264, 1868; Freeholders *v.* Strader, 3 Harr. (N. J.) 108, 1840; approved, 3 Dutch. (N. J.) 415; Cooley, Const. Lim. 240, *et seq.*; Niles Township *v.* Martin, 4 Mich. 557; Larkin *v.* Saginaw County (defective bridge), 11 Mich. 88; Lesley *v.* White, 1 Speers (South Car.), Law, 31; Young *v.* Commissioners, &c. 2 Nott & McCord, 537; Carroll *v.* Board, 28 Miss. 38; Anderson *v.* State, 23 *ib.* 459; Hedges *v.* Madison County, 1 Gilm. (Ill.) 567. *Infra*, Secs. 762, 763, 766, 785, 789, and cases cited.

in the first place, be remarked, that it is a general principle of law, founded in reason, that where one suffers an injury by the neglect of any duty owing to him which rests upon another, the person injured has his action. This doctrine applies not only to individuals, but to *private corporations aggregate*, and it obliges such corporations to respond in a private action, though such action be not expressly given by statute, for the damages which another may suffer by reason of neglect or default to perform any *corporate* duty.[1]

§ 762. In this state of the law the question was presented for decision at an early day in Massachusetts, whether *towns* in that state (the statute being silent upon the subject), stood upon the same footing as respects liability for damages arising from their neglect of duty as individuals and private corporations, and it was decided they did not, and that in order to subject them to a civil action in favor of an individual for neglect in respect to their public duties, though enjoined by statute, the legislature must expressly give the action. Applying this principle, it was accordingly held, in Mower *v.* Leicester,[2] that a town was not liable in a common law action for damages sustained by an individual through a *defect in the highways of the town.* This case, or the English case upon

[1] As to private corporations, this is well illustrated by the early case in Massachusetts, of Riddle *v.* Proprietor of Locks and Canals, &c., 7 Mass. 169. This was an action of *case* against the defendants, a canal corporation, who were bound by their charter to construct their canal so deep and wide that rafts of a certain description could pass through it when the same could pass the river with which it was connected, but which failed, to the plaintiff's injury, thus to construct their canal. It was objected that no private action lay against a corporation for a breach of its duty, even though special injury was suffered, the only remedy being by information or indictment. And it was specially urged that there were technical objections to maintaining trespass or trespass upon the case. These objections were disposed of in the most satisfactory manner by the terse and luminous judgment of *Parsons*, C. J., who decided that the action would lie, and placed the decision upon the broad and clear grounds stated in the text; viz: that private corporations, *i. e.* corporations created for their own benefit, equally with individuals, are liable for any damages which another may suffer by reason of any neglect or default to perform any corporate duty: Weld *v.* Proprietors, &c. 6 Greenl. 93 (liability of boom companies); Ward *v.* Turnpike Company, Spencer (N. J.), 323, 325; Parnaby *v.* Canal Co. 11 A. & E. 223.

[2] Mower *v.* Leicester, 9 Mass. 247, 1812.

which it was based,[1] has been generally followed throughout the New England States, and has resulted in the establishment therein, and in the very general recognition elsewhere, of the doctrine that without a statute giving it, no private action lies against towns in New England or other *quasi* corporations for the neglect of duties enjoined on them by general legislative enactment applicable to all such corporations as governmental or public agencies. Accordingly, in the different states, organizations such as counties, townships, school districts, road districts, and the like, though possessing corporate capacity

[1] Russell *v.* The Men dwelling in the county of Devon, 2 Term R. 661. In this case an individual brought his action against the county for an injury he sustained by its neglect to repair a county bridge. The duty to repair was admitted. That the defendant was liable to indictment for neglect to repair was conceded. And inasmuch as it had no *corporate fund*, or means of obtaining such a fund, out of which a judgment could be satisfied, and because each inhabitant would be liable to satisfy the judgment, which might be levied on one or two individuals, who would have no (practicable) means whatever of reimbursing themselves," it considered that the action could not be maintained. But this reason does not apply to ordinary chartered municipalities, nor, in fact, to any public body having a corporate fund, or the means of obtaining one, out of which the judgment may be satisfied. In Riddle *v.* Proprietors, &c. 7 Mass, 169, 187, the decision in Russell *v.* Devon, *supra*, is considered as based upon "sound reason," and it was approved in England in Mackinnon *v.* Penson, 25 Eng. Law and Eq. 457, 1854. It is reviewed and commented on in many subsequent cases; see particularly: Weightman *v.* Washington, 1 Black, 39, 52, 53; Morey *v.* Newfane, 8 Barb. 645; Young *v.* Commissioners, &c. 2 Nott & McCord (South Car.), 537; Beardsley *v.* Smith, 16 Conn. 375; Ball *v.* Winchester, 32 N. H. 443; Eastman *v.* Meredith, 36 N. H. 284, 1858, cited *infra*, Sec. 763, note.

Mode of enforcing liabilities of New England towns: It may be here remarked that, *at common law, corporators are not personally liable for the debts of the corporation; but by usage and practice*, peculiar in this country to the New England States, *quasi* corporations, as towns, counties, and parishes, are an exception to this rule, and private property may be taken to satisfy a corporate judgment. The history of this anomalous usage, and the reasons for it, are stated at large by *Church*, J., in Beardsley *v.* Smith, 16 Conn. 368, 1844. See, also, Union *v.* Crawford, 19 Conn. 331; Fernald *v.* Lewis, 6 Greenl. 264, 268, *per Weston*, J.; Brewer *v.* New Gloucester, 14 Mass. 216; Merchants Bank *v.* Cook, 4 Pick. 405, 414; Chase *v.* Merrimack Bank, 19 Pick. 564; Gaskill *v.* Dudley, 6 Met. 551. Remedy of inhabitant over: Beers *v.* Botsford, 3 Day (Conn.), 159. But it is otherwise in case of corporations proper; and, out of New England, the author is aware of no instance, even in the case of *quasi* corporations in which, without a statute to that effect, private property has been considered liable to pay public debts: *Ante*, Sec. 446; also, pp. 641, note, 647, note; North Lebanon *v.* Arnold, 47 Pa. St. 488.

and power to levy taxes and raise money, have been very generally considered *not to be liable in case, or other form of civil action, for neglect of public duty, unless such liability be expressly declared by statute.*[1]

[1] Treadwell *v.* Commissioners, 11 Ohio St. 190, *per Gholson*, J.; Hedges *v.* Madison county, 1 Gilm. (Ill.) 567; Freeholders *v.* Strader, 3 Harr. (N. J.) 108; Van Eppes *v.* Commissioners, 25 Ala. 460, 1854; Larkin *v.* Saginaw County, 11 Mich. 88; Bray *v.* Wallingford; 20 Conn. 416, 419. *Supra*, p. 30, Sec. 10; p. 33, p. 82, Sec. 39; Sec. 761, and cases cited.

Liability of counties for neglect of officials, &c.: A *county*, though it has power to erect and repair public buildings, and to levy and collect a tax for that purpose, *is not responsible*, in the absence of a statute making it so, for *injuries resulting from the unsafe and dangerous condition of county buildings*, especially where there exists no statute authorizing the levy of a tax to satisfy such a judgment. A county was accordingly held not to be liable for an injury suffered by the plaintiff who, when in attendance upon court as a witness, was precipitated into the cellar of the court house in consequence of the *negligent omission of the agents or officers of the county* to guard or light a dangerous opening leading into the cellar: Commissioners of Hamilton County *v.* Mighels, 7 Ohio St. 109, 1857, cited *ante*, p. 31 note, overruling the early case of The Commissioners *v.* Butt, 2 Ohio, 348, recognized, but without examination, as authoritative, in Richardson *v.* Spencer, 6 Ohio, 13; following, Russell *v.* The Mayor of Devon, 2 Term R. 661; approving, Riddle *v.* The Proprietors, &c. 7 Mass. 169; Mower *v.* Leicester, 9 Mass. 247; Young *v.* Commissioners of Roads, 2 Nott & McCord (South Car.), 537; White *v.* City Council, 2 Hill (South Car.), 571; Ward *v.* County of Hartford, 12 Conn. 404; Freeholders *v.* Strader, 3 Harris. (N. J.) 108; Hedges *v.* County of Madison, 1 Gilm. (Ill.) 567; Fowle *v.* Alexandria, 3 Pet. 409; Morey *v.* Newfane, 8 Barb. 645. See similar case of Eastman *v.* Meredith, *infra*, Sec. 763, note. It was said, *arguendo*, in 7 Ohio St. 109, *supra*, that a municipal corporation proper, would, under like circumstances, have been liable: See, on this point, *infra*, Secs. 772–779. So, in Georgia, a county, although it is its duty to keep a good and sufficient jail, *is not liable for an escape caused by the insufficiency of the jail*, though the sheriff may have been made liable therefor, there being no statute giving such an action: The Governor *v.* Justices, &c. 19 Ga. 97, 1855, citing Russell *v.* Men of Devon, 2 Term Rep. 661. S. P. Haygood *v.* Justices, 20 Ga. 845. See, also, Peters *v.* State, 9 Ga. 109. *County courts* in Missouri are not agencies of the county, but a branch of the state judiciary, and hence the county is not liable for their judicial action, or non-action: Miller *v.* Iron County, 29 Mo. 122; State *v.* St. Louis County Court, 34 Mo. 546. *The county is part of the body of the state:* Commonwealth *v.* Brice, 22 Pa. St. 211. Is liable as at common law for services of *physician* in making a *post mortem* examination at request of coroner: Alleghney County *v.* Shaw, 34 Pa. St. 301. But not liable for *medical treatment of prisoner* taken ill on his trial: Commonwealth *v.* Hall, 7 Watts, 290. Liability of counties on *warrants or orders:* See Index: *Orders—Warrants.*

§ 763. In New England, as will hereafter be shown, there is, indeed, a liability upon both cities and towns for injuries caused by unsafe or defective highways and streets, but this liability is wholly and strictly statutory. The rule of law just mentioned is there adhered to, but it is not of universal application even as to towns, for it is considered that there may be instances in which they are civilly liable for neglect of duty without an express statute to that effect.[1] Speaking of the rule established in the before mentioned case of Mower *v.* Leicester, that a private action cannot be maintained against a *quasi* corporation for neglect of corporate duty unless the action be given by statute, Mr. Justice *Metcalf*, in a quite recent case,[2] says: "And so it has ever since been held by this and other courts. *This rule of law, however, is of limited application.* It is applied in the case of towns only to the neglect or omission of a town to perform those duties which are imposed upon *all* towns, without their corporate assent, and exclusively for public purposes; and not to the neglect of those obligations which a town incurs when a special duty is imposed on it, with its consent, express or implied, or a special authority is conferred on it, at its request. In the latter cases, a town is subject to the same liabilities, for the neglect of those special duties, to which private corporations would be, if the same duties were imposed or the same authority conferred on them — including their liability for the *wrongful neglect* as well as the *wrongful acts of their officers and agents.*"

[1] Oliver *v.* Worcester, 102 Mass. 489, 496, 1869; Blodgett *v.* Boston, 8 Allen, 237, 1864; Stickney *v.* Salem, 3 *ib.* 374; Chisey *v.* Canton, 17 Conn. 475, 478, 1846; approving Mower *v.* Leicester, 9 Mass. 247; Reed *v.* Belfast, 20 Maine, 246. *Infra*, Secs. 786, 787.

[2] Bigelow *v.* Randolph, 14 Gray (Mass.), 541, 543, 1860; Eastman *v.* Meredith, 36 N. H. 284, 1856, and Conrad *v.* Ithaca, 16 N. Y. 158, 1857, elsewhere referred to, are approved. See, also, *ante*, p. 33, p. 82, Sec. 39; *supra*, Sec. 761, *et seq.*; *post*, Secs. 772–778, 800–802.

New England town.— Liability for neglect of public duty.— Defective town house.— The question of the right to maintain an action against a New England town (the nature of which has been before considered), for neglect of duty, in the absence of statute either giving or prohibiting such an action, was learnedly and ably examined by the Supreme Court of New Hampshire, in the case of Eastman *v.* Meredith, just mentioned and heretofore referred to (*ante*, p. 38, Sec. 12). The material facts were, that the defendant (the town of Meredith) built a town house, in which, among other pur-

§ 764. But as respects *municipal corporations proper*, whether specially chartered or voluntarily organizing under general acts of the character before alluded to,[1] it is, we think, universally considered, even in the absence of a statute giving the action, that they are liable for acts of *misfeasance* positively injurious to individuals, done by their authorized agents or officers, in the course of the performance of corporate powers constitutionally conferred, or in the execution of corporate duties; and it is the almost, but not *quite*, uniform doctrine of the courts,

poses, to hold town meetings. The house, by the negligence of those who built it for the town, was so defectively constructed that the flooring, at an annual town meeting, gave way, and the plaintiff, an inhabitant and legal voter, in attendance upon the meeting, received a serious bodily injury. The plaintiff's injury was caused by the insufficiency of the building. The court concedes for the argument, that it was the duty of the town to provide a safe and suitable place for holding town meetings (see *ante*, p. 34, note), and, treating the case on this basis, states the question to be decided thus: "Whether a citizen of the town who suffers a private injury in the exercise of his public rights from neglect of the town to perform this public duty, can maintain an action against the town to recover damages for the injury?" It was held that the plaintiff could not recover; and this decision rests mainly upon the ground that a statute is necessary, and has been uniformly so considered in New England since the early cases of Riddle *v.* Locks, &c. 7 Mass. 169, 187 (*supra*, Sec. 762, note), and Mower *v.* Leicester, 9 Mass. 250 (*supra*, Sec. 762), in order to subject towns to a civil action for neglect to perform a public duty. Towns in New Hampshire and the New England states, it is stated, are created by general law. They give no assent, at least no express assent, to the act creating them. They are involuntary territorial and political divisions of the state, for the purposes of government and municipal regulation. They are declared by statute to be corporations, but this does not enlarge their duties or liabilities (*ante*, pp. 34–39). The case was considered to be one of new impression, and on these grounds was distinguished by the court from cases in England decided under charters which imposed a public duty upon the corporation as the *condition or price of the corporate franchises*, and from cases decided in other states in this country, in which cities and towns have been held liable to a civil action for neglect to perform public duties growing out of grants conferring special powers and privileges for local advantage or benefit. [*Ante*, p. 82, Sec. 39; see *infra*, Secs. 764, 772–778, 789, 802.]

Conformably to these principles, it was held in Bigelow *v.* Randolph, 14 Gray, 541, above cited, that a town in Massachusetts which has assumed the duties of a school district is *not liable for an injury sustained by a scholar* attending the public school *from a dangerous excavation in the school house yard*, owing to the negligence of the town officers. *Unsafe court house: Supra*, Sec. 762, note.

[1] *Ante*, p. 57, Sec. 20; p. 65, Sec. 24; p. 67, Sec. 26.

that they are also liable where the wrong resulting in an injury to others consists in a *mere neglect* or omission to perform *an absolute and perfect* (as distinguished from a discretionary, *quasi* judicial, or imperfect) *corporate* duty, owing by the corporation to the plaintiff, or in the performance of which he is specially interested.[1] But there is, as elsewhere stated, not a little diversity of opinion as to what duties are *corporate* duties, and when officers, though appointed or elected by the corporation, are to be regarded as the officers of the corporation, and not of the state or the general public.[2] And especially have the courts been much perplexed respecting the *principle* upon which to rest the distinction, so generally taken, by which what is termed a *quasi* corporation, though possessing full corporate capacity and a corporate purse, is not *impliedly liable* for acts of misfeasance or neglect of public duty on the part of its officers and agents, while for the same or a similar wrong there is such a liability resting on municipal or chartered corporations. *But the distinction, whatever its ground, is well established;* and the latter class of corporations is considered to be impliedly liable for acts done in what is termed their *private* or *corporate character*, and from which they derive some special or immediate advantage or emolument, but not as to those done in their *public capacity*, as governing agencies, in the discharge of duties imposed for the public or general (not corporate) benefit.[3]

§ 765. Not only is the distinction just mentioned well established, but, as practically applied in the reported judgments of the courts, it has tended to promote justice and to secure individual rights. This liability on the part of municipal corporations springs, as we think, from the particular *nature of*

[1] *Post*, Sec. 778, and cases cited; Secs. 800–802.

[2] *Supra*, Secs. 39, 755, 758, 761–763; *infra*, 772–778.

[3] See cases cited *ante*, Sec. 39, pp. 82, 83, 84; *supra*, Secs. 755, 758, 761–763; *infra*, Secs. 772–778, 786, 789, 802. See, also, Oliver *v.* Worcester, 102 Mass. 489, 499, 1869; Richmond *v.* Long's Administrators, 17 Gratt. (Va.) 375, 1867; Western Savings Fund Society *v.* Philadelphia, 31 Pa. St. 175, 189, *per Strong*, J. These cases all refer to the case of Bailey *v.* Mayor, &c. of New York, 3 Hill, 531, and to the distinction taken by *Nelson*, C. J., between the public and private capacity of municipal corporations.

the duty enjoined, which must relate to the local or special interests of the municipality, and be imperative, and not discretionary or judicial, and from the *means given* for its performance, which must be ample or such as were considered to be so by the legislature, and not from the supposed circumstance that they received and accepted their charters or grants of powers or franchises *upon an implied contract* with the state that they would discharge their corporate duties, and that this contract enures to the benefit of every individual interested in its performance.[1] Unlike municipal corporations created by royal charters, which cannot be imposed or altered without the consent of the corporators, except, indeed, by parliament,[2] our American corporations, in all their parts and functions, general and special, are mere emanations or creations of the sovereignty of the state, which confers and changes their powers at its will. There is no relation of *contract* between them and the state; and the notion that in any accurate sense the state makes a contract with a municipality, when conferring powers, either for the general or local advantage, seems to be purely ideal.[3]

§ 766. The rule of law is a general one, that *the superior or employer must answer civilly for the negligence or want of skill of his agent or servant* in the course or line of his employment, by which another is injured. Municipal corporations, under the conditions herein stated, fall within the operation of this rule of law, and are liable, accordingly, to civil actions for damages when the requisite elements of liability co-exist. To create such a liability, it is fundamentally necessary that the act done which is injurious to others must be *within* the scope of the corporate powers as prescribed by charter or positive enactment (the extent of which powers all persons are bound, at their peril, to know); in other words, it must not be *ultra vires* in the sense that it is not *within* the power or authority of

[1] This is the *rationale* of the doctrine of the cases, as stated by *Selden*, J., in Weet *v.* Brockport, 16 N. Y. 161, 173, note, and it is the one adopted by Mr. Justice *Cooley* in his work on Constitutional Limitations, 247, 248, and in many reported cases. Its soundness is ably combatted by Mr. Justice *Campbell*, in Detroit *v.* Blakeby, 9 Am. Law Reg. (N.S.) 670; S. C. 21 Mich. 84.

[2] *Ante*, p. 44, Sec. 15.

[3] *Ante*, p. 52, Sec. 17; p. 63, Sec. 23; pp. 70, 71, Secs. 29, 30; p. 82, Sec. 39.

the corporation to act in reference to it under any circumstances.[1] If the act complained of lies *wholly outside* of the general or special powers of the corporation as conferred in its charter or by statute, the corporation can in no event be liable, whether it directly commanded the performance of the act or whether it be done by its officers without its express command; for a corporation cannot, of course, be impliedly liable to a greater extent than it could make itself by express corporate vote or action.[2] But if the wrongful act be not in this sense *ultra vires*, it may be the foundation of an action of tort against the corporation, either when it was done by its officers under its previous direct authority, or has been ratified or adopted, expressly or impliedly, by it, or when it was done by the officers, agents, or servants of the corporation, in the execution of *corporate powers* or the performance of *corporate duties* of a ministerial nature, and was done so negligently or unskillfully as to injure others, in which case the corporation is liable for the carelessness or want of skill of its officers or immediate servants or agents in the course of their authorized employment, without express adoption or ratifying act. Such are the general principles of the law, concerning which there is no disagreement;[3] but when we come to their application, considerable difference of opinion will be found as to what acts are, and what are not, *ultra vires*, and what powers and duties are, within the meaning of the rule, as stated, *corporate* powers and duties; for if the duty, though devolved by law upon an officer elected or appointed by the corporation, is not a *corporate duty*, the officers of the corporation, in performing it, do not act for the corporation, and hence the corporation is not

[1] *Ante*, Secs. 381, 749, 755; *post*, Sec. 766.

[2] *Ib.* As to implied liability, see *ante*, Secs. 383–387, 750.

[3] *Post*, Secs. 769, 772–778, 781, 789, 800–802. See, also, Thayer *v.* Boston, 19 Pick. 511, 1837, where the subject of the liability of a municipal corporation for the unauthorized acts of its officers is discussed by *Shaw*, C. J.; Anthony *v.* Adams, 1 Met. (Mass.) 284, 1840; Baker *v.* Boston, 12 Pick. 84; Perley *v.* Georgetown, 7 Gray, 464, 1856; Howell *v.* Buffalo, 15 N. Y. 512, 1857; Baltimore *v.* Eschbach, 18 Md. 276; State *v.* Kirkley, 29 Md. 85, 110, 1868; Harvey *v.* Rochester, 35 Barb. 177, 1861; Leman *v.* Mayor, &c. of New York, 5 Bosw. 414; Railroad Company *v.* Quigley (private corporation held responsible for libel), 21 How. 202, 1858.

responsible (unless expressly declared to be by statute) for the omission to perform it or for the manner in which it is performed.[1]

§ 767. These general principles may be illustrated and enforced by a reference to some of the adjudicated cases; and first, the proposition that there can be *no corporate liability when the act complained of is one not authorized by the charter*, or constituent act of the corporation, or some valid legislative enactment applicable to it. We have heretofore seen that contracts *ultra vires* in the sense just explained, impose no corporate liability,[2] and for the same reasons, the doctrine applies to *acts* other than contracts, whether performed by the municipal council, or under its direction, or by officers in the execution of their supposed powers or duties. The principle that a municipal corporation is bound by the acts of its officers only when within the charter or scope of their powers, and that acts outside of the powers of the corporation, or of the officers appointed to act for it, are void as respects the corporation, is vital; and the opposite doctrine has no support in reason, and very little, if any, in the judgments of the courts. The principle just mentioned is exemplified in an interesting manner, in a case[3] where the authorities of the city of Albany assumed to build a private bridge across the basin to a pier in the Hudson river. The only authority for the performance of the work was an *unconstitutional statute*. The bridge fell, in consequence solely of the negligent and improper manner in which it had been constructed by the city. It was decided by the Court of Appeals, reversing the judgment of the Supreme Court, that the corporation was not liable to an action for damages at the suit of a person injured by the accident.

[1] *Supra*, Secs. 755, 758, 763; *infra*, Secs. 772–778, 800–802.

[2] *Ante*, Secs. 381, 749, 755, 766.

[3] Mayor, &c. of Albany *v.* Cunliff, 2 Comst. 165, 1849, reversing S. C. 2 Barb. 190.

A case in Illinois may here appropriately be noticed, which, in connection with the one just stated, will illustrate the *principle* on which the liability of the corporation depends. By statute, a city was authorized "to construct an *embankment and plank road*" across a certain bottom, and under this authority constructed a *pile bridge* across the bottom in so careless a manner that the horse of plaintiff, when rightfully upon the way, fell

§ 768. So, upon the same principle, where the *selectmen of a town caused a dam to be erected* (an act the town was not authorized by law to do) which flooded the plaintiff's land, the town was held not liable for the injuries resulting therefrom.[1] So a city corporation has no legal power or right to call a *meeting of the citizens to consider political or philanthropic purposes;* and if it does so even by ordinance of its common council, and a person at a meeting thus assembled is injured by the discharge of a cannon fired by persons present, the corporation is not liable.[2] So, in another case, the incorporating act *prohibited the trustees of a village corporation from laying out any street* so as to run over the site of any building the expense of removing which should exceed one hundred dollars. The object of this prohibition was considered to be to protect the tax-payers, as well as for the benefit of the owners of buildings. The trustees, exceeding their powers, laid out a street in the site of which there was a building, the expense of moving which would exceed the sum named. In an action brought against the corporation by the land owner whose property was taken for the street, it was decided by the Supreme Court of New York that the whole proceeding was a nullity, and that the corporation was not estopped to set up the want of jurisdiction in defence, notwithstanding the property of the plaintiff had actually been taken.[3]

through and was killed. When sued for this injury, the defence of the city was, that it was only authorized to build an embankment and plank road, and that in building the pile bridge it *exceeded its authority*, and hence it is not the act of the city, but only of its officers, and therefore the city is not responsible for the injury. But the court held, inasmuch as the city was authorized to construct a road at the place where it constructed this road, that its failure to construct it in the designated mode but made its liability the more plain, distinguishing the case from one where the officers of the city should, *without authority*, construct such a work in another jurisdiction: Pekin *v.* Newell, 26 Ill. 320, 1861.

[1] Anthony *v.* Adams, 1 Met. (Mass.) 284, 1840. Approved, Walling *v.* Shreveport, 5 La. An. 660, 1850. *Infra*, Sec. 797.

[2] Boyland *v.* Mayor, &c. of New York, 1 Sandf. (S. C. R.) 27, 1847. Same Principle, Boom *v.* Utica, 2 Barb. 104 (trespass by agent where corporation had no power involves no corporate liability): Cuyler *v.* Rochester, 12 Wend. 165; Swift *v.* Williamsburg, 24 Barb. 427; Starr *v.* Rochester, 6 Wend. 564. Morrison *v.* Lawrence (injury by city fireworks), 98 Mass. 219, 1867.

[3] Cuyler *v.* Rochester, 12 Wend. 165, 1834.

§ 769. Cases such as those just mentioned are to be *distinguished from others* which resemble them in the circumstance of relating to illegal acts, but which arise out of matters or transactions *within the general powers* of the corporation, and in respect of which there may be a corporate liability. Thus, if in exercising its power to open or improve streets, the agents or officers of a municipal corporation, under its authority or direction, *commit a trespass upon, or take possession of, private property*, without complying with the charter or statute, the corporation is liable in damages therefor.[1] In such cases, also, an action will lie against a city corporation by the owner of land through which its agents have unlawfully made a sewer,[2] or for trees destroyed and injuries done by them.[3] A case in Louisiana, which was several times before the courts in that state, was decided upon the same principle. The mayor of a city tortiously, and in defiance of an injunction, proceeded at the head of a force of laborers and demolished a portion of the plaintiff's house, for the supposed reason that it was on public ground. The city corporation ratified the act by defending it.

That acts, ultra vires, though done colore officii, impose no corporate liability: See Baltimore *v.* Eschbach, 18 Md. 276; *Ib.* 284; State *v.* Kirkley, 29 Md. 85, 111, 1868; Horn *v.* Baltimore, 30 Md. 218, 1868, approving, Howell *v.* Buffalo, 15 N. Y. 512; Cole *v.* Nashville, 4 Sneed (Tenn.), 162, 1856, cited *ante*, Sec. 755, note; Mitchell *v.* Rockland, 52 Maine, 118, reaffirming S. C. 45 *ib.* 496; 41 *ib.* 363, where the health officers of a town, without authority of law, took possession of the plaintiff's vessel, and in the process of fumugation, set it on fire, and the town was held not liable.

[1] Hildreth *v.* Lowell, 11 Gray, 345, 1858, approving Thayer *v.* Boston, 19 Pick. 516, 1837; Soulard *v.* St. Louis, 36 Mo. 546, 1865; Walling *v.* Shreveport, 5 La. An. 660, 1850; Allen *v.* Decatur (trespass), 24 Ill. 332, 1860; Lee *v.* Sandy Hill, 40 New York, 442, 1869, where a corporate liability was asserted for the *torts of the highway officers* in encroaching upon the plaintiff's property by direction of the governing body of the corporation, under the erroneous supposition that it was part of the street: *Mason*, J., approves of the rule as stated by *Shaw*, C. J., in Thayer *v.* Boston, *supra*. *Infra*, Secs. 771, 772.

In Soulard *v.* St. Louis, *supra*, where *a street was opened upon land without condemnation*, the court held that an action might be maintained by the owner, that he might recover as damages the value of the land appropriated, which, when paid, would, the court was inclined to think, work *ipso facto* a dedication thereof to the city: *Ante*, Sec. 479.

[2] Hildreth *v.* Lowell, 11 Gray, 345, 1858.

[3] Walling *v.* Shreveport, 5 La. An. 660, 1850.

On the first appeal the court doubted whether the corporation could be made liable for the wrongful acts charged against its officers, especially as these were alleged to have been done by them wilfully and maliciously. On the second appeal it was held, that although the acts of the mayor were done without the previous order of the city council, yet the corporation, by reason of its subsequent ratification, was liable, and the plaintiff recovered.[1]

§ 770. *Prima facie*, a municipal corporation *is not liable for the trespass and wrongful acts of its officers, though done colore officii;* but it will clearly be liable therefor where the act, if not wholly *ultra vires*, was expressly authorized by the governing body of the corporation, or where, without such special authority, it was done by its officers in the scope of their duties and employment, and has been ratified by the corporation.[2] Accordingly, a municipal corporation is not liable for the illegal seizure of the plaintiff's property by one of its officers, for an alleged violation of its ordinances, when, in fact, no such violation took place, and the corporation had not previously authorized the act, or subsequently ratified it by receiving the proceeds of the sale of the property seized, or in some other manner.[3] If, however, the corporation, by its authorized action, *adopts the illegal acts* of its officers, done in the line of official duty, it will be liable therefor, however it might be in the absence of such ratification. Therefore, where the officers of a city illegally seized the personal property of the plaintiff,

[1] McGary *v.* Lafayette, 12 Rob. (La.) 668. On re-hearing, *ib.* 674. S. C. again, 4 La. An. 440, 1849. Approved, Wilde *v.* New Orleans, 12 La. An. 15, 1857. See, also, Lee *v.* Sandy Hill, *supra*, Sec. 769, note. *Ante*, Secs. 98, 372, note.

[2] Thayer *v.* Boston, 19 Pick. 511, 516, 1837, where the rule, as stated by *Shaw*, C. J., makes the corporation, without ratification, liable, also, for the acts its officers "done *bona fide*, in pursuance of a general authority to act for the city on the subject to which they relate." Approved by *Mason*, J.; Lee *v.* Sandy Hill, 40 N. Y. 442, 449, 1869; compare, Perley *v.* Georgetown, 7 Gray, 464, 1856, cited *infra*, and statement of rule by *Metcalf*, J.; Moore *v.* Railroad Company, 4 Gray, 465, 467, 1855; Howell *v.* Buffalo, 15 N. Y. 512, 519, note remarks of *Denio*, C. J., p. 521. *Supra*, Sec. 768, and note; Angell & Ames, Sec. 311.

[3] Fox *v.* Northern Liberties, 3 Watts & Serg. 103, 1841. *Infra*, Sec. 773.

and detained it, and the plaintiff brought suit against the city to recover the property, and the city filed an answer which involved a ratification of the acts of the officers in question, and an admission that they were the acts of the city, and the city was defeated in the suit, it was held liable for the damage done to the plaintiff by the illegal seizure and detention of his property.[1] On the principle that a town is not liable for the trespasses or illegal acts of its officers or agents, unless such acts were done under its authority previously conferred, or have subsequently been ratified by it, it was held in Massachusetts, that if a *town collector*, without being authorized, commits a person to prison for not paying a tax, since abated, though illegally included in his warrant, the town is not responsible, in an action of tort, for false imprisonment.[2]

§ 771. A municipal corporation *may be liable as respects illegal and void acts*, where these are within the scope of the general powers of the corporation, and where the enforcement of such acts by its officers under its authority has been compulsory, resulting in injury to individuals. Falling within this principle is the liability of the corporation to refund void taxes

[1] Wilde *v.* New Orleans, 12 La. An. 15, 1857; following, McGary *v.* Lafayette, 4 *ib.* 440; Johnson *v.* Municipality, 5 *ib.* 100. In another case in the same state it was held that though property be, in the first instance, lawfully seized for the violation of an ordinance, yet if the corporate authorities *fail to pursue the requisite steps* in advertising and disposing of the property seized, the act of seizure by the officer, becomes a *trespass ab initio*, for which the corporation, it was decided, might be liable to restore the property or pay its value: Baumgard *v.* Mayor, &c. 9 La. An. 119, 1835.

[2] Perley *v.* Georgetown, 7 Gray, 464, 1856. Afterwards paying the collector's fees for serving the warrant, and the jailer's charges, were held not to ratify the arrest, it not appearing that they were so intended. In New York, see Lorillard *v.* Monroe, 11 N. Y. (1 Kern.) 392, 1854; Bank *v.* Mayor, &c. 43 N. Y. 184. But the *treasurer of a town corporation* is clearly its officer and agent, for whose acts, within the scope of his power, it is liable: Tucker *v.* Rochester, 7 Wend. 254; cited 2 Denio, 473, and see cases there referred to. But it is not liable for money placed in his hands by individuals or received by him other than in the line of his official duties: Tolman *v.* Marlborough, 3 N. H. 57, 59.

The previous personal and unauthorized act of a public officer will not estop him from acting in his public capacity as he may deem the public good to require: Day *v.* Green, 4 Cush. 433, 1849; Dill *v.* Wareham, 7 Met. 433, 1844.

and assessments compulsorily collected for its own benefit.[1] So where a municipal corporation made a *void assessment* upon the plaintiff for a street improvement, and its officers seized its property (bank bills) to pay it, the majority of the Court of Appeals of New York held, and we think properly, that since the assessment was made for a purpose within the general powers of the corporation (though the particular assessment was illegal) the corporation was liable to the plaintiff in a common law action for the trespass committed by its officers in seizing his property.[2]

§ 772. It may be observed, in the next place, that when it is sought to render a municipal corporation liable for the *act of servants or agents, a cardinal inquiry is, whether they are the servants or agents of the corporation.* If the corporation appoints or elects them, and can control them in the discharge of their duties; can continue or remove them; can hold them responsible for the manner in which they discharge their trust; and if those duties relate to the exercise of *corporate* powers, and are for the peculiar benefit of the corporation in its local or special interest, they may justly be regarded as its agents or servants, and *the maxim of respondeat superior applies.* But if, on the other hand, they are elected or appointed by the corporation in obedience to the statute, to perform a public service not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers of government, if they are independent of the corporation as to the tenure of their office and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation, for whose acts or negligence it is impliedly liable, but as public or state officers with such powers and duties as the statute confers upon them,

[1] *Supra*, Sec. 750, and cases cited.

[2] Howell *v.* Buffalo, 15 N. Y. 512, 1857; *Denio*, C. J., and *Bowen*, J., dissented. The chief judge, in his dissenting opinion, expressed his inability to see how the assessment could be *void*, and yet be a corporate act and impose a corporate liability. The majority opinion can, we think, be sustained on the principle stated in the text: Bennett *v.* Buffalo, 17 N. Y. 383, 386, corrects the report of Howell *v.* Buffalo, so as to show that *Comstock*, J., agreed with the majority of the court as to the liability of the corporation: Bank, &c. *v.* Mayor, &c. 43 N. Y. 184.

and *the doctrine of respondeat superior is not applicable.*[1] It will thus be seen that, on general principles, it is necessary, in order to make a municipal corporation impliedly liable on the maxim of *respondeat superior* for the wrongful act or neglect of an officer, that it be shown that the officer was *its* officer, either generally or as respects the particular wrong complained of, and not an independent public officer; and, also, that the wrong was done by such officer while in the legitimate exercise of some duty of a corporate nature which was devolved on him by law or by the direction or authority of the corporation.[2]

[1] The Mayor, &c. *v.* Bailey (Croton Dam Case), 2 Denio, 433, 447, 1845, and authorities cited by Hand, senator. *Infra*, Sec. 779; Walcott *v.* Swampscott (surveyor of highways), 1 Allen (Mass.), 101, 1861, *per Bigelow*, C. J.; *infra*, Sec. 777; White *v.* Phillipston, 10 Met. 108; Hafford *v.* New Bedford, 16 Gray, 297, 1860; *infra*, Sec. 774; Griggs *v.* Foote, 4 Allen, 195, 197; Buttrick *v.* Lowell (assault by police officer), 1 Allen, 172, 1861; *infra*, Sec. 773; Kimball *v.* Boston, 1 Allen, 417; Child *v.* Boston (sewers), 4 Allen, 41, 52, 1862; Morrison *v.* Lawrence, 98 Mass. 219, 1867; *infra*, Sec. 802; *supra*, Secs. 758, 762.

Thus, in New York, the mayor and aldermen, in making an *order for the destruction of a building* pursuant to the statute (2 R. L. 1813, p. 368, Sec. 81), were considered to act *not as the officers or agents of the corporation, but as magistrates or public officers*, designated by their official names by the legislature for the execution of a public duty: Russell *v.* Mayor, &c. of New York, 2 Denio, 461, opinion of Sherman, senator, at p. 473, and of Porter, senator, at p. 481. The case was distinguished from that of Bailey *v.* The Mayor, &c. of New York, 2 Denio, 433; affirming, S. C. 3 Hill, 531, in relation to the Croton aqueduct, where, on the ground that the corporation had an interest in the grant, held property under it, and passed ordinances in relation to the execution of the work, it was held liable for the acts and neglect of the *water commissioners* in relation to the work, though they were appointed by the governor and the senate; *supra*, Secs. 757, 758; *infra*, Sec. 779.

As to the personal liability of public officers or agents created by statute, for official acts and neglect, see Nowell *v.* Wright, 3 Allen (Mass.), 166, and cases cited. *Ante*, Sec. 176, and note.

[2] Same authorities. *Infra*, Secs. 773–778. *Respondeat superior. Corporations—when liable and when not for the torts of their officers:* Hilsdorf *v.* St. Louis, 45 Mo. 94; Lyman *v.* Bridge Company, 2 Aiken (Vt.), 255, 1827; Hinde *v.* Navigation Company, 15 Ill. 73; Morrison *v.* Lawrence, 98 Mass. 219; Fisher *v.* Boston, 104 Mass. 87, 1870; Stewart *v.* New Orleans, 9 La. An. 461; Bennett *v.* New Orleans, 14 La. An. 120, 1849; Mitchell *v.* Rockland, 52 Me. 118; Small *v.* Danville, 51 Me. 359; distinguished from Thayer *v.* Boston, 19 Pick. 511; Alcorn *v.* Philadelphia (city surveyor), 44 Pa. St. 348, 1863;

§ 773. Agreeably to the principles just mentioned, *police officers appointed by a city are not its agents or servants*, so as to render it responsible for their unlawful or negligent acts in the discharge of their duties; and, accordingly, a city is not liable for an *assault and battery* committed by its police officers, though done in an attempt to enforce an ordinance of the city;[1] nor for *an arrest* made by them which is illegal for want of a warrant;[2] nor for their *unlawful acts of violence*, whereby, in the exercise of their duty of suppressing an unlawful assemblage of slaves, the plaintiff's slave was killed.[3] So, on the same, principle, a person who suffers a personal injury *while aiding the police officers* of a city, at their request, in arresting disturbers of the public peace under a valid ordinance, has no remedy against the city.[4]

Reilly *v.* Philadelphia (when contractor for local improvement is the agent of the city), 60 Pa. St. 467; Hilliard *v.* Richardson, 3 Gray (Mass.), 349; approved and distinguished in Chicago *v.* Robbins, 2 Black (U. S.), 418, 428; Ready *v.* Mayor, &c. (acts of city marshal) 6 Ala. 327, 1844; Cowley *v.* Sunderland (mayor of) 6 H. & N. 565.

[1] Buttrick *v.* Lowell, 1 Allen, 172, 1861; Kimball *v.* Boston, *ib.* 417; *ante*, p. 76, Sec. 33; p. 78, Sec. 34; *supra*, Sec. 770. See, also, Atwater *v.* Baltimore, 31 Md. 462, 1869, in which it was held that the city was not liable for the neglect of the *board of police commissioners*, who are not appointed by, or responsible to, the corporation; distinguished from Marriott *v.* Baltimore, 9 Md. 160.

[2] Pesterfield *v.* Vickers, 3 Coldw. (Tenn.) 205, 1866, approving Buttrick *v.* Lowell, *supra*. Nor for the act of the *recorder in wrongfully refusing bail;* the remedy in such cases must be sought against the officers personally: *Ib.*; Ready *v.* Mayor, &c. (city marshal) 6 Ala. 327, 1844.

[3] Stewart *v.* New Orleans, 9 La. An. 461, 1854. S. P. in similar action, Dargan *v.* Mobile (slave negligently killed by an officer of the city guard in attempting to arrest him for a breach of its ordinances—city held not liable), 31 Ala. 469, 1858. The opinion of *Walker*, J., is well considered. Compare Johnson *v.* Municipality, 5 La. An. 100, 1850, in which the corporation was held liable for the neglect of duty on the part of *the keeper of the police jail*, resulting in the death of the plaintiff's slave. The decision is upon the ground that the keeper was the agent of the corporation, and that it was liable for his acts and defaults in the discharge of his duties; but *quære*, and see comments of *Walker*, J., in Dargan *v.* Mobile, 31 Ala. 469, 477, 1858; Richmond *v.* Long's Administrators, 17 Gratt. (Va.) 375, 1867, approving Stewart *v.* New Orleans, and Dargan *v.* Mobile, above cited.

Liability of city for *loss of slave* put to work *in city chain gang:* Clague *v.* New Orleans, 13 La. An. 275.

[4] Cobb *v.* Portland, 55 Maine, 381, 1868; Sutton *v.* Board of Police, 41 Miss. 236.

The municipal corporation in all these cases represents the state or the public; the public officers are not the servants of the corporation, and hence the principle of *respondeat superior* does not apply.

§ 774. So, although a municipal corporation has power to extinguish fires; to establish a fire department; to appoint and remove its officers, and to make regulations in respect to their government, and the management of fires, *it is not liable for the negligence of firemen* appointed and paid by it, who, when engaged in their line of duty, upon an alarm of fire, ran over the plaintiff in drawing a hose reel belonging to the city, on their way to the fire;[1] nor for injuries to the plaintiff caused by the bursting of the hose of one of the engines of the corporation, through the negligence of a member of the fire department.[2] The exemption from liability is placed upon the ground that the service is performed by the corporation in obedience to an act of the legislature; is one in which the corporation has no particular interest, and from which it derives no special benefit in its corporate capacity; that the members of the fire deparment, although appointed by the city corporation, are not the agents and servants of the city, for whose conduct it is liable; but they act rather as officers of the city, charged with a public service, for whose negligence in the discharge of official duty no action lies against the city, without being expressly given; and the maxim of *respondeat superior* has, therefore, no application.[3] Nor is such a corporation liable to the owner of property destroyed or damaged by fire, in consequence of its *neglect to provide suitable engines* or fire apparatus, or to provide and keep in repair public cisterns.[4] A liability on the part of the corporation was sought to be sustained, upon the ground of the neglect of a *corporate duty*, but the court considered that powers of this nature conferred upon

[1] Hafford *v.* New Bedford, 16 Gray (Mass.), 297, 1860.

[2] Fisher *v.* Boston, 104 Mass. 87, 1860; distinguished from Oliver *v.* Worcester, 102 Mass. 489.

[3] *Per Bigelow*, C. J., in Hafford *v.* New Bedford, *supra*. *Supra*, Sec. 758.

[4] Wheeler *v.* Cincinnati, 19 Ohio St. 19, 1869. S. P. Patch *v.* Covington, 17 B. Mon. 722, 1856; Brinkmeyer *v.* Evansville, 29 Ind. 187; Weightman *v.* Washington, 1 Black, 39, 49. *Supra*, Sec. 758.

municipal corporations were legislative and governmental, and excluded the notion of responsibility to individuals based on neglect or nonfeasance, and distinguished the case from those in which the duty is purely ministerial.

§ 775. So where a city, under its charter and the general law of the state, enacted to prevent the spread of contagious diseases, establishes a hospital, it is not responsible to persons injured by reason of the misconduct of its agents and employes therein; and, accordingly, the city of Richmond was held *not to be liable for the loss of a slave admitted to the hospital of the corporation* to be treated for the small-pox, and whom the servants of the city in charge of the hospital negligently suffered, when delirious, to escape, wander off, and die.[1]

§ 776. A municipal corporation is not responsible for the mistakes or the want of care or skill of the *city surveyor or engineer*, whether appointed and removable by it or elected by the people, when he performs duties (though the performance thereof be regulated by ordinance) for or between *private individuals*—as for example, fixing the boundary between their lots[2]. In such case, the principle of *respondeat superior* does

[1] Richmond *v.* Long's Administrators, 17 Gratt. 375, 1867; approves Dargan *v.* Mobile, 31 Ala. 469; Stewart *v.* New Orleans, 9 La. An. 461; and goes on the ground that the duty here was public, and not private, and hence the city not liable for acts and defaults of its officers; and is itself approved and followed in a similar case in Missouri: Murtaugh *v.* St. Louis, 44 Mo. 479, 1869, in which it was held that the city was not liable to a non-paying patient in its hospital for injuries caused by the *neglect or misconduct of the hospital officers or servants:* Sherbourne *v.* Yuba County, 21 Cal. 113, 1862, holding that a *county* was not liable in damages to an inmate of its hospital for unskillful treatment of the *resident physician.* Powers in respect to *health: Ante*, Secs. 95, 303–305. Liability for acts of *health officers*, see *ante*, p. 315, note; Rudolphe *v.* New Orleans, 11 La. An. 242, which was action for damages for alleged illegal order of board of health in ordering a ship to leave the city; Mitchell *v.* Rockland (illegal taking possession of a vessel), 41 Maine, 363; S. C. 45 Maine, 496, 1858; re-affirmed, 52 Maine, 118; Harrison *v.* Baltimore, 1 Gill (Md.), 264, 1843, cited *ante*, p. 137, Sec. 95.

[2] Alcorn *v.* Philadelphia, 44 Pa. St. 348, 1863. *Thompson*, J., considered it as a case of first impression, and distinguished it from those asserting corporate liability for defective streets. Erie *v.* Schwingle, 22 Pa St. 384, 1853; Dean *v.* Milford Township, 5 Watts & Serg. 545; Dayton *v.* Pease, 4 Ohio St. 80, 100, 1854, *per Ranney*, J., and see *ib.* 416; McCarty *v.* Bauer, 3 Kansas, 237, 1865 (personal action against engineer for erroneous survey). When *personally* liable: *Ib. Ante*, p. 214, and note.

not apply, as it does or may when this officer acts for the corporation, or under its direction, in making *corporate improvements.*[1]

§ 777. On the same principle, treating *surveyors of highways* elected by the town as public, rather than municipal, officers, a New England town is not liable for an injury sustained by a person by reason of the negligence of a laborer in the course of his employment by the highway surveyor to aid him in the discharge of his official duty. Nor is it liable for damages occasioned by *the wrongful acts of the surveyor himself* in performing his official duties.[2] But it would be otherwise where the working and repair of streets is treated (as in many of the states it is) as a municipal duty, and the officer in charge as a corporate, in distinction from an independent public officer, or where the injury was negligently caused by such officer in the process of executing upon the streets an authorized *corporate* improvement or work, for then the doctrine of *repondeat superior* would apply.[3]

[1] Dayton *v.* Pease, 4 Ohio St. 80, 1854, where the city was held liable for injuries caused by the fall of a bridge, owing to the negligence and want of skill of the city engineer; McCarty *v.* Bauer, *supra;* Rochester White Lead Company *v.* Rochester, 3 Comst. (N. Y.) 463, 1850. *Supra,* Sec. 789.

[2] Walcott *v.* Swampscott, 1 Allen, 101, 1861; Barney *v.* Lowell, 98 Mass. 570; *supra,* Sec. 769, note. Compare Foreman *v.* Canterbury, Law Rep. 6 Q. B. 214. Limited powers of New England *town: Ante,* p. 34, Sec. 11; *supra,* Sec. 763, note. And the surveyor himself is only liable in damages for wanton malicious or improper acts in making or repairing the highways in his district: Rowe *v.* Addison, 34 N. H. 306, 312, and cases cited. *Ante,* p. 214, note and cases.

Constables, though appointed by the town, are not its agents or servants, and the town is not liable for their default, the statute not having so provided: Hurlburt *v.* Litchfield, 1 Root (Conn.), 520, 1793.

And so, in New York, *town assessors and collectors of taxes* are independent public officers, and not the agents or servants of the towns in their corporate capacity: Lorillard *v.* Monroe, 11 N. Y. 392, 1854. See Bank *v.* Mayor, 43 N. Y. 184.

In Vermont, towns are made liable by statute for "*default*" or "*neglect*" of *town clerks* in respect to *official* duties: Hunter *v.* Winsor ("index" or "alphabet" book), 24 Vt. 327; *ib.* 338, 580. What are *official acts* or *defaults:* Lyman *v.* Edgerton, 29 Vt. 305; Jarvis *v.* Barnard, 30 Vt. 492.

[3] *Infra,* Secs. 789, 790, 802; Rochester White Lead Company *v.* Rochester, 3 N. Y. (3 Comst.) 463; Eastman *v.* Meredith, 36 N. H. 295, *per Perley,* C. J., *obiter;* Baker *v.* Boston, 12 Pick. 184; Thayer *v.* Boston, 19 Pick. 511, 516,

§ 778. The doctrine may be considered as established, that *where a duty is a corporate one*, that is, one which rests upon the municipality in respect of its special or local interests, and not as a public agency, *and is absolute and perfect*, and not discretionary or judicial in its nature, *and is one owing to the plaintiff*, or in the performance of which he is specially interested, that *the corporation is liable in a civil action* for the damages resulting to individuals by its neglect to perform the duty, or for the want of proper care or want of reasonable skill of its officers or servants acting under its direction or authority in the execution of such a duty; and with the qualifications stated, it is liable, on the same principles, and to the same extent, as an individual or private corporation would be under like circumstances.[1] For illustration, if a city neglects its ministerial duty to cause its sewers to be kept free from obstructions to the injury of a person who has an interest in the performance of that duty, it is liable, as we shall see, to an action for the

1837. *Supra*, Secs. 770, 769, note. In Scott *v.* Mayor, &c. of Manchester, 37 Eng. Law & Eq. 495, 1856 (S. C. 1 H. & N. 59), by the negligence of workmen employed by the city in laying its own gas pipes in the streets, the plaintiff's eye was injured, and the city held liable, on the principle of *respondeat superior*. Affirmed on appeal, 2 H. & N. 204. Same principle, Foreman *v.* Canterbury, Law Rep. 6 Q. B. 214, 1871. So, in Delmonico *v.* Mayor, &c. of New York, 1 Sandf. (S. C. R.) 222, 1848, the plaintiff recovered for damages occasioned by the negligence of the defendants in constructing a sewer. There was a recovery against the city in Lloyd *v.* Mayor, &c. of New York, 1 Seld. 369, 1851, for the negligence of persons employed by the proper officers of a corporation in leaving a dangerous hole in the street over night, in the process of repairing the public sewers. *Infra*, Secs. 801, 802, as to sewers; *supra*, Sec. 753. The adjudged cases differ, as elsewhere shown, as to what are public, and what corporate, undertakings; but the *principle* on which the liability turns is the one stated in the text.

[1] Lloyd *v.* Mayor, &c. of New York, 1 Seld. 369, 1851; McCullough *v.* Mayor, &c. of Brooklyn, 23 Wend. 458, 1840; Clayburg *v.* Chicago (refusal to collect assessment) 25 Ill. 535, 1861; Sterrett *v.* Houston, 14 Texas, 153, 1855. But was the duty here a corporate one? McLaughlin *v.* Municipality, 5 La. An. 504, 1850; Walling *v.* Mayor, &c. *ib.* 660; Richmond *v.* Long, 17 Gratt. 375, 1867; Sawyer *v.* Corse, 17 Gratt. (Va.) 230; Lacour *v.* Mayor, &c. of New York, 3 Duer, 406; Conrad *v.* Ithaca, 16 N. Y. 158, 1857; Barton *v.* Syracuse, 36 N. Y. 54. *Supra*, Sec. 753. *Infra*, Secs. 800–802. The rule stated in the text should not, perhaps, be extended to a case where the effect of a recovery would be to charge the corporate treasury with a burden which does not belong to it, and where the person injured by the neglect to perform the duty can compel an execution of it by *mandamus* to

damages thereby occasioned.[1] So, if a city owns a wharf and receives wharfage or profit therefrom, it is liable for injuries caused by a failure to keep it in proper condition and repair.[2] So, in respect to its failure to keep its streets in a safe condition for public use, where this is a duty resting upon it.[3]

The liability of the corporation for its negligence, or that of its servants, is especially clear where it has received a consideration for the duty to be performed, or where, under permissive authority from the legislature, it voluntarily assumes and carries on a work or undertaking from which it receives tolls or derives a profit.[4]

§ 779. So the city of New York, as the owner of a dam on the Croton river, situate upon lands the *title* to which was in the city, and being part of the works built to supply the city with pure water, was, upon great consideration, held liable, though the dam was constructed at the instance and expense of the city, by *water commissioners* appointed by the *state*, and not by, or under the control of, the city authorities, to an action for injuries sustained by a third person in consequence of the dam (which was negligently and unskilfully built) being carried away by a freshet.[5]

the proper officers of the corporation: McCullough *v.* Brooklyn, *supra*. *Ante*, Sec. 402. *Post*, Sec. 784. When duty rests upon the *corporation*, and when upon its officers in their *individual capacity: Ante*, p. 112, Sec. 63; Martin *v.* Mayor, &c. of Brooklyn, 1 Hill (N. Y.), 145. Were the trustees here, *independent* corporate officers?" See Conrad *v.* Ithaca, 16 N. Y. 158.

[1] *Infra*, Sec. 802; Lloyd *v.* Mayor, &c. of New York, 1 Seld. 369, 1851.

[2] *Ante*, Sec. 77; Skinkle *v.* Covington, 1 Bush (Ky.), 617, 1866; Fennimore *v.* New Orleans, 20 La. An. 124. Liability for dangerous approach to, see Carleton *v.* Iron Company, 99 Mass. 216. Pittsburg *v.* Grier, 22 Pa. St. 54.

[3] *Infra*, Sec. 789, *et seq.*

[4] Scott *v.* Manchester (carrying on gas works), 2 Hurl. & Norm. 204, 1857, affirming S. C. 1 *ib.* 59; Cowley *v.* Sunderland (mayor of), 6 *ib.* 565; Pittsburg *v.* Grier, 22 Pa. St. 54, 1853; Mersey Dock Cases, 11 H. Lds. Cases, 687; Henly *v.* Mayor, &c. of Lyme Regis, 2 Cl. & F. 331.

[5] Mayor, &c. of New York *v.* Bailey, in Court of Errors, 2 Denio, 433, 1845; same case, names reversed, in Supreme Court, 3 Hill (N. Y.), 531, 1842. While there was no doubt in the opinion of the Supreme Court, and comparatively little in the Court of Errors, that the city was liable, there was much diversity of opinion as to the ground of the liability. The Supreme Court (3 Hill, *supra*,) makes the case turn upon the question "whether the

§ 780. Upon similar grounds, municipal corporations, for the improper management and use of their property,[1] are liable to the same extent and in the same manner as private corporations and natural persons. Unless acting under some valid special legislative authority, they must, like individuals, use their own so as not to injure that which belongs to another, or unjustly or improperly invade private rights. Thus, they may erect buildings for corporate purposes, but if in so doing they should place its foundations in such a manner as to cause water to flow back on private owners, the latter

water commissioners charged with the immediate superintendence and execution of the work stand in the relation of agents deputed by *the city* to perform this duty." They hold that the city, by voluntarily accepting the benefit of the acts, by approving the plan of the commissioners, and by instructing them to proceed with the execution of the work, adopted and constituted the commissioners the *agents of the city*, and therefore, on the principle of *respondeat superior*, it was liable for *their* neglect and want of skill in the erection of the dam. In the Court of Errors (2 Denio, above cited), Chancellor *Walworth* doubted this basis of the defendant's liability, and said: "It is upon the ground that the dam was the property of the city corporation, and that such corporation was legally bound to see that its corporate property was not used by any one so as to become noxious to the occupiers on the river below, that the judgment (of the Supreme Court) in the case must be sustained, if it can be sustained at all. And upon that ground, though, I confess, with some hesitation, I shall assent to the affirmance of the judgment of the court below." It was affirmed by nineteen members against four; but as the most of them delivered no opinions, the exact grounds of the affirmance cannot be known. Without doubting that Chancellor *Walworth's* position is sound, it seems to us clear that the view of the Supreme Court, that the water commissioners became the agents of the city by adoption, is correct. *Denio*, C. J., in Darlington *v.* Mayor, &c. of New York, 31 N. Y. 164, 200, speaking of Bailey *v.* The Mayor, says, that the Court of Errors substantially repudiated the view of the Supreme Court, which affirmed the enterprise of furnishing the city with water to be a *private* work, as distinguished from an act of municipal government, and that the city was held liable on account of its legal personality and its responsibility as such for the negligent acts of its agents and officers in the execution of their duties: *Supra*, Sec. 772, note.

There is *no liability* on part of the city as owner of the Croton Aqueduct for injuries from defects in the *lateral service pipes* inserted by consumers of water into the mains: Terry *v.* Mayor, &c. of New York, 8 Bosw. (N. Y.) 594. See Cowley *v.* Sunderland, 6 H. & N. 565, as to the liability of a municipal corporation for injuries caused by the unsafe condition of its property.

[1] See *ante*, Chap. XV. on Corporate Property; Cowley *v.* Sunderland (mayor of), 6 H. & N. 565.

would have their action for the damage, the same as if the injury had been caused by an individual.[1] Similarly, a municipal corporation, *with control of a public common*, traversed by foot-paths, on which the public may rightfully travel, is liable to a common law action for damages caused by a *dangerous and unguarded excavation* made by the corporation for its own purposes, in the ground adjoining one of the paths, to a person walking thereon, and who was at the time using due care.[2] So, in a case in which it appeared that a city corporation was the owner of a market-house, the stalls of which it rented, but in front of which there was a pavement or open passage, which it seems was under the control of the city and not of its lessees; in the pavement there was a *dangerous hole in front of one of the stalls* into which the plaintiff, while attending the market, fell and was injured; the court considered the market-house to be the private property of the corporation, that it was its duty to keep it in a safe condition, and that it was liable for any injury happening to individuals in consequence of its neglect to perform this duty.[3]

[1] Eastman *v.* Meredith, 36 N. H. 296, *per Perley*, C. J.; Bailey *v.* Mayor, &c. of New York, 3 Hill, 531, 541, *per Nelson*, C. J.; Thayer *v.* Boston, 19 Pick. 511; Rhodes *v.* Cleveland, 10 Ohio, 159; Lacour *v.* Mayor, &c. of New York, 3 Duer, 406, 1854; Brower *v.* Mayor, &c. of New York, 3 Barb. 254, 1848; Treadwell *v.* Mayor, &c. of New York, 1 Daly (N. Y.), 123; Rochester White Lead Company *v.* Rochester, 3 N. Y. (3 Comst.) 463. In Weet *v.* Brockport, 16 N. Y. 161, 172, Mr. Justice *Selden*, referring to Rochester White Lead Company *v.* Rochester, just cited, says: "The recovery rested upon the obvious principle that a municipal corporation is no more exempt from liability in case it creates a nuisance, either public or private, than an individual." *Post*, Secs. 797–802.

Nuisances, and power of municipal corporation to prevent and abate: See *ante*, Secs. 308–312; People *v.* Albany, 11 Wend. 539 (no power to destroy a work [a bulkhead] *authorized by law*, because injurious to the public health); Hart *v.* Mayor, &c. of Albany, 9 Wend. 571; affirming, S. C. 3 Paige, 213; Denning *v.* Roome, 6 Wend. 651; Wetmore *v.* Tracy, 14 Wend. 250; Rochester *v.* Collins, 12 Barb. 559, 1850; Ray *v.* Lynes (blacksmith shop), 10 Ala. 63, 1846.

[2] Oliver *v.* Worcester, 102 Mass. 489, 499, 1869. The principle is tersely stated by *Hoar*, J.: *Ib.* 496; and the authorities cited by *Gray*, J.: *Ib.* 499. It was considered to be an act done by the city in its *private, as distinguished from its public character*. *Post*, Sec. 790, note; Sec. 795, note.

[3] Savannah *v.* Cullens, 38 Geo. 334, 1868.

§ 781. The principle is well settled, and has, as we shall see in the course of the present chapter, very extensive application to the acts of municipal corporations, viz: that such a corporation is ***not*** *liable to an action for consequential damages* to private property or persons (unless it be given by statute) where the act complained of was done by it or its officers *under and pursuant to authority conferred by a valid act of the legislature*, and there has been no want of reasonable care or want of reasonable skill in the execution of the power, although the same act, if done without legislative sanction, would be actionable.[1] This is well illustrated by an important case in Wisconsin against the city of Milwaukee, in which the plaintiff sought to recover damages sustained by reason of a *harbor improvement* made by the city under special authority from the legislature. There was no allegation that the damages were the result of negligence or want of care in making the improvement; but the recovery was sought because the effect of the improvement was to allow the waters of the lake to be

[1] Callender *v.* Marsh, 1 Pick. 418, 1823; Radcliff's Executors *v.* Mayor, &c. of Brooklyn, 4 Comst. 195; Rounds *v.* Mumford, 2 Rh. Is. 154, 1852; Sprague *v.* Worcester, 13 Gray, 193, 1859; Bennett *v.* New Orleans, 14 La. An. 120, 1849; Snyder *v.* Rockport, 6 Ind. 237, 1855; *supra*, Sec. 766; Perry *v.* Worcester, 6 Gray, 544; Flagg *v.* Worcester, 13 Gray, 601, 605, 1859, *per Merrick*, J.; The Governors, &c. *v.* Meredith, 4 Term R. 794; White House *v.* Fellowes, 10 C. B. (N. S.) 779; Mersey Docks Cases, 11 House of Lords Cases, 713, 714, 1866, *per Blackburn*, J., who, speaking of this subject, says: "If the legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful. * * But though the legislature has authorized the execution of the works, it does not thereby exempt those authorized to make them from *the obligation to use reasonable care* that, in making them, no unnecessary damage shall be done." The distinction is between damage resulting from authorized works where the legislative authority is a bar to an action unless given by statute, and damage by reason of the work being negligently done, as to which the remedy of the party injured by action remains: Brine *v.* Railway Company, 110 Eng. Com. Law (2 Best & S.), 402, 411, 1862, *per Crompton*, J. See, also, Hicks *v.* Dorn, 42 N. Y. 47, 1870; *infra*, Secs. 798, 800–802. *Post*, Secs. 797–802.

Where a municipal corporation possesses *the legal authority* to do an act, it is immaterial to *inquire into its motives* for doing it, and erroneous to make its liability depend upon the motives with which the act was done: Benjamin *v.* Wheeler, 8 Gray, 409, 1857; Mayor, &c. *v.* Randolph, 4 Watts & Serg. (Pa.) 514, 1842 (stopping water-course); Chatfield *v.* Wilson, 28 Vt. 49; S. C. 5 Am. Law Reg. (O. S.) 528; *infra*, Sec. 783, note; City Council *v.* Gilmer, 33 Ala. 116, 1858.

driven by the wind through the canal or channel thus artificially made by the city, into and upon the lots of the plaintiff in the vicinity, causing them to be washed away and rendered insecure and unfit for use. But the court decided (applying the principle above stated) that the plaintiff's action could not be maintained.[1]

§ 782. In connection with the principle that there is no implied liability for doing an act which is either directed or authorized by a valid statute, may be noticed the power of municipal corporations *to grade, and to change the established grade or level of their streets*, though the exercise of the power may be injurious to the adjoining property owners. The public nature of streets; the uses to which they may lawfully be put; the authority of the legislature over them; the nature of the rights of the adjacent proprietors, of the municipality, and of the public with respect thereto; and of the delegated authority of municipal bodies or officers to improve and graduate them, are topics which have been considered in a former chapter.[2] In view of the nature of streets as there explained, and of that control over them which of right belongs to the state,[3] and of the nature of the ownership of lots bounded thereon, which implies subjection, if not consent, to the exercise and determination of the public will respecting what grades or changes in the grades thereof shall, from time to time, be found necessary, and what other improvements thereon or therein (within the legitimate purposes of streets[4]) shall be found expedient, it results, we think, that adjoining property owners are not entitled, of *legal right*, without statutory aid, to compensation for damages which result as *an incident*

[1] Alexander *v.* Milwaukee, 16 Wis. 247, 1862; cited and distinguished, Pettigrew *v.* Evansville (surface water), 25 Wis. 223. *Post*, Sec. 798.

[2] Chap. XVIII. on Streets. *Ante*, p. 500, *et seq.* The power to grade is a *continuing* one: *Ante*, Sec. 543. "As the duty of keeping the street in repair is a continuing one, so is the power necessary to perform it:" *Per Grier*, J.; Smith *v.* Washington, 20 How. 135, 148, 1857.

"*Grading*," as applied to streets, means their "reduction to a certain degree of ascent or descent:" *Ib. Per Grier*, J. *Ante*, Secs. 542, 619, note, 636.

[3] *Ante*, Sec. 518, *et seq.*

[4] What are such purposes: *Ante*, Sec. 538, *et seq.*

or consequence of the exercise of this power by the state or the municipality by delegation from the state.

§ 783. Accordingly, the courts, by numerous decisions in most of the states, have settled the doctrine that municipal corporations, acting under authority conferred by the legislature to make and repair, or to grade, level, and improve streets, if they exercise reasonable care and skill in the performance of the work resolved upon, are not answerable to the adjoining owner, whose lands are not actually taken, for consequential damages to his premises, unless there is a provision in the charter of the corporation, or in some statute, creating the liability. There is no such liability, even though in grading and leveling the street a portion of the adjoining lot, in consequence of the removal of its natural support, falls into the highway. And the same principle applies, and the same freedom from implied liability exists, if the street be embanked or raised so as to cut off, or render difficult the access to the adjacent property. And this is so, although the grade of the street has been before established, and the adjoining property owner had erected buildings or made improvements with reference to such grade.[1]

[1] Callender *v.* Marsh, 1 Pick. 418, 1823, the leading case on this subject, and where the question was examined by *Parker*, C. J., with characteristic ability. The ground of the doctrine is thus stated by him: "Those who purchase house lots bordering upon streets are supposed to calculate the chance of such elevations and reductions as the increasing population of a city may require, in order to render the passage to and from the several parts of it safe and convenient, and as their purchase is always voluntary, they may indemnify themselves in the price of the lot which they buy, or take the chance of future improvements, as they shall see fit. They are presumed to foresee the changes which public necessity or convenience may require:" 1 Pick. 431. *Post*, Secs. 798–802.

Its doctrine has been very generally followed, as will be seen by the cases below cited. In *Massachusetts:* Griggs *v.* Foote, 4 Allen, 195; Brown *v.* Lowell, 8 Met. 172; Benjamin *v.* Wheeler, 8 Gray, 409.

In *New York:* Radcliff's Executors *v.* Mayor, &c. of Brooklyn, 4 Comst. (N. Y.) 195, 1850, in which the subject is discussed at length by *Bronson*, C. J., who holds that there is no liability, both upon the ground that the damages complained of result as an incident from the exercise of legislative authority, and upon the ground (more doubtful) that the land of the street *belongs* to the corporation, and they may level or fill it at pleasure, so that they do not touch the adjoining property. See, also, in New York, Graves

§ 784. Provision in a city charter, or other statute, authorizing the opening and improving of streets or the construction of works of a public nature therein, within the scope of the

v. Otis, 2 Hill, 466; Wilson *v.* Mayor, &c. 1 Denio, 595, 1845; Benedict *v.* Goit, 3 Barb. 459; Matter of Fifth street, 17 Wend. 667; Mills *v.* Brooklyn, 32 N. Y. 489, 1865. See Waddell *v.* Mayor, &c. of New York, 8 Barb. 95. *Post*, Sec. 798.

So, also, in *Pennsylvania:* Green *v.* Reading, 9 Watts, 382, approved, 20 How. (U. S.) 149. S. P. Reading *v.* Keppleman, 61 Pa. St. 233; Henry *v.* Pittsburg, &c. Company, 8 Watts & Serg. 85; Charlton *v.* Allegheny City, 1 Grant Cas. 208; Carr *v.* Northern Liberties, 35 Pa. St. 324. *In re* Ridge Street, 29 Pa. St. 391; Commissioners *v.* Wood, 10 Pa. St. 93. In O'Connor *v.* Pittsburg, 18 Pa. St. 187, 1851, approved, Smith *v.* Washington, 20 How. (U. S.) 135, 149, 1859, a church had been built *according to the direction of the city regulator*, and in accordance with a *prior established grade*. Afterwards, the city authorities reduced the grade seventeen feet; the church had to be taken down and rebuilt, at an expense of $4,000. The authority given to the city was "to improve, repair, and keep in order the streets," &c. The Supreme Court of Pennsylvania say: "We had this case re-argued, in order to discover, if possible, some way to relieve the plaintiff consistently with law, but grieve to say we can find none. The law is settled, not only in Pennsylvania, but by every decision in the sister states except one [Ohio, see *infra*]." *Gibson*, C. J., puts the decision upon the ground that as respects such matters the public corporation is the agent of the state, and partakes of the state's exemption from liability to be sued. Respecting the Ohio decisions, below referred to, he remarks, that though "founded on natural justice, they are not founded in the law which prevails elsewhere.'

So, in *Indiana:* Snyder *v.* Rockport, 6 Ind. (Port.) 237, 1855, approving Radcliff's Executors *v.* Brooklyn, *supra;* re-affirmed in Lafayette *v.* Spencer, 14 Ind. 399, 1860, where the same principle was held applicable, *under the general Municipal Corporations Act.* See, also, Macy *v.* Indianapolis, 17 Ind. 267; Lafayette *v.* Bush. 19 Ind. 326; Vincennes *v.* Richards, 23 Ind. 381. So, in *Rhode Island:* Rounds *v.* Mumford, 2 Rh. Is. 154, 1852. So, in *Louisiana:* Reynolds *v.* Shreveport, 13 La. An. 426, 1856, approving Radcliff's Executors *v.* Brooklyn, *supra*, and Goszler *v.* Georgetown, 6 Wheat. 593, 1821, cited *ante*, Sec. 542. So, in *Georgia:* Rome *v.* Omberg, 28 Ga. 46, 1859; Roll *v.* Augusta, 34 Ga. 326, 1866; Markham *v.* Mayor, &c. 23 Ga. 402, 1857. Lot owner cannot enjoin: *Ib.* So, in *Illinois:* Murphy *v.* Chicago, 29 Ill. 279, 287, 1862; Roberts *v.* Chicago, 26 Ill. 249, 1861. So, in *Tennessee:* Humes *v.* Mayor, &c. 1 Humph. (Tenn.) 403, 1839. And in *Maine:* Hovey *v.* Mayo, 43 Me. 322, 1857. So, in *Missouri*, both as to grade, and change of grade: Taylor *v.* St. Louis, 14 Mo. 20, 1851; St. Louis *v.* Gurno, 12 Mo. 414, 1849, following Callender *v.* Marsh, *supra;* Hoffman *v.* St. Louis, 15 Mo. 651, 1852. So, in *Connecticut:* Hooker *v.* New Haven, &c. Company, 14 Conn. 146; Skinner *v.* Bridge Company, 29 Conn. 523. So, in *Iowa:* Creal *v.* Keokuk, 4 G. Greene, 47, 1853, approving Callender *v.* Marsh, *supra;* Cotes *v.* Davenport, 9 Iowa, 227, 1859; Cole *v.* Muscatine, 14 Iowa, 296; Ellis *v.*

legitimate uses of streets and highways, are not unconstitutional, unless there be special provision to that effect, because they omit to provide compensation for those who, although

Iowa City, 29 Iowa, 229, 1870; Burlington *v.* Gilbert, 31 Iowa, 356; Warren *v.* Henly, *ib.* 31, 1870. So, in *Mississippi:* White *v.* Yazoo City, 27 Miss. 327.

So, in the *federal courts:* Goszler *v.* Georgetown, 6 Wheat. (U. S.) 593, 1821, cited *ante*, Sec. 542; Smith *v.* Washington, 20 How. (U. S.) 135, where the power of the city was "to open and keep in repair streets," &c.

In *Kentucky* the general doctrine that the corporation is not liable for consequential damages caused by changing the grade of a street has been affirmed by the Court of Appeals of that state: Keasy *v.* Louisville, 4 Dana, 154, 1836, opinion by *Robertson*, C. J. But in a late case in that state the majority of the court qualified the doctrine, and assumed a middle ground; namely: that if the improvement of the street is of the usual character, and the incidental damages such as ordinarily result, the law affords no remedy; but if the improvements are extraordinary, and peculiarly injurious, they can only be made on condition that the adjoining owners be compensated. This view makes the right to compensation depend, not upon the fact of injury, but the amount, and treats the improvement of the street as a *taking* of the property of the lot owner. If it is a taking, then, for *any* injury, he should be entitled to compensation. *Robertson*, J., dissented, holding in accordance with the prevailing doctrine elsewhere, that the city might change the grade as it should judge the public interest required, taking care to avoid all peril or inconvenience which could be avoided by a proper execution of the work, and being liable only for such loss as might be occasioned by the wanton and unskilful mode of execution: Louisville *v.* Rolling Mill Company, 3 Bush (Ky.), 416, 1867.

In *Ohio* the law as to the liability of municipal corporations has been designedly and deliberately carried beyond the limits established by the current of decisions elsewhere. They are here held liable for consequential injuries which result from the exercise of their lawful powers, though these powers be exercised judiciously, without malice, and without illegality, the court proceeding upon the ground that if an act (digging drains, as in Rhodes *v.* Cincinnati, 10 Ohio, 159, or cutting down a street, as in McCombs *v.* Akron, 15 Ohio, 474; S. C. 18 Ohio, 229), though legal, and legally executed, be done for the good of all to the injury of an individual, the injury should, in justice and good morals, be shared by all. See Goodloe *v.* Cincinnati, and Smith *v.* Same, 4 Ohio, 500, 514, injuries to property by grading, and consult Crawford *v.* Village of Delaware, 7 Ohio St. 459, 1857; Scovil *v.* Giddings, 7 Ohio, part 2, page 211; Hickox *v.* Cleveland, 8 Ohio, 543, which last two accord with authorities elsewhere. In Crawford *v.* Delaware, *supra*, the doctrine is admitted to be in "direct conflict with the decisions both in England and America," and known to be so when decided. This doctrine, says *Bronson*, C. J., 4 Comst. 195, 205, *supra*, is not law "beyond the state of Ohio." Referring to the Ohio cases, the Supreme Court of Wisconsin declare them not to be law, but observe that there "is much justice and equity in the principle they adopt:" Alexander *v.* Milwaukee, 16 Wis. 247, 256, 1862.

their property be not *taken*, suffer indirect or consequential damages. Although the adjoining property may be injured, still it is not, in a constitutional sense, *taken* for public use.[1] If,

Municipal power to enlarge liability by ordinance in respect to damages caused by change of grade, see Goodall *v.* Milwaukee, 5 Wis. 32, 1856, but *quære.* Approved by *Paine*, J., Weeks *v.* Milwaukee, 10 *ib.* 242, 270. See Pearce *v.* Milwaukee, 18 Wis. 32; Goodrich *v.* Milwaukee, 24 Wis. 422. *Ante*, Secs. 61, 244, 251, 542.

Where the power is not exceeded, there is no liability to adjacent owner for grading the *whole width*, and so close to his line as to cause *his earth or fences and improvements to fall*, and the corporation is not bound to furnish supports or build a wall to protect it: Taylor *v.* St. Louis, 14 Mo. 20, 1851; St. Louis *v.* Gurno, 12 Mo. 414, 1849; Rome *v.* Omberg, 28 Ga. 46, 1859. In thus holding, *Lumpkin*, J., who delivers the opinion of the court, remarks: "I confess, my convictions are not so clear as I could wish them to be." The same doctrine was, however, subsequently adhered to in Roll *v.* Augusta, 34 Ga. 326. *Contra:* Mears *v.* Wilmington, 9 Ire. 73, where the general rule is recognized, but where it seems to have been held that it was the duty of the authorities "to have erected a substantial wall as the excavation proceeded, and thus prevented the caving in of the plaintiff's lot." And the substance of the reasoning of the very able judge (*Pearson*, J.,) who delivered the opinion is, that it is *implied* that the corporation will do the work *properly*, and that if in such a case they failed to take measures to protect the plaintiff's lot (which was improved), they failed to do the work properly, and are liable to an action; but it seems difficult, judicially, to sustain this intermediate ground, however just in its results.

Implied corporate liability recognized for *working beyond or below established grade:* Cole *v.* Muscatine, 14 Iowa, 296, 299. But this was not the main question in the case.

Courts will not inquire whether the grade adopted be the best one, or whether one causing less damage would not equally have answered the purpose intended: Roberts *v.* Chicago, 26 Ill. 249, 1861; Snyder *v.* Rockport, 6 Ind. 237, 1855; Reynolds *v.* Shreveport, 13 La. An. 426, 1856. And the reason is, that the determination of such questions has been committed by the legislature to the governing body of the corporation, and not to the judicial tribunals.

As to wantonness, oppression, or malice, in exercising the power: Rounds *v.* Mumford, 2 Rh. Is. 154, 1852; Reynolds *v.* Shreveport, *supra;* Rudolphe *v.* New Orleans, 11 La. An. 242; Roberts *v.* Chicago, 26 Ill. 249, 1861; Mayor *v.* Randolph, 4 Watts & Serg. 514, 1842. *Supra*, Sec. 781, note: Henderson *v.* Railway Company (Court of Exchequer), 25 L. T. (N. S.) 881, 1871.

[1] Callender *v.* Marsh, 1 Pick. 418, 430, 1823; Thurston *v.* Hancock, 12 Mass. 220. Note doubts in dissenting opinion of Mr. Justice *Story*, in Charles River Bridge *v.* Warren Bridge, 11 Peters, 638, and note by Kent: 2 Kent, Com. 340, note, 6th ed. But the doctrine in the text was asserted by the Court of Appeals, upon great consideration, in Radcliff's Executor *v.* Mayor, &c. of Brooklyn, 4 Comst. 195, 205, 1850. S. P. What constitutes a *taking:*

in such cases, the *statute provides a specific remedy*, or a remedy other than an ordinary civil action, that remedy alone can be pursued.[1] Accordingly, where a municipal charter provided that whenever the common council should change the grade of a street, "they should make compensation to the owners of property for actual damages thereby caused," and provide for such payment by an assessment upon all real estate benefited, and an action was brought against the city by an individual injured by a change in the grade of a street, alleging as a breach of duty that the city would not pay, or provide for the payment of the damages, it was held that he could not recover, because the effect of a recovery would be to throw the burden upon the whole city, when the law imposed it on those supposed to be locally benefited. The court regarded the case as one where the law provided a special mode of obtaining payment from a particular fund, and that the plaintiff's remedy was not by a suit for damages, but by *mandamus* to compel the council to make the assessment and collection; and the judgment of the court was, we think, correct.[2]

§ 785. We come now to consider the civil liability of municipal corporations for *injuries to private persons caused by defective or unsafe streets and sidewalks*. And here it is important to attend to the different grades of corporations, and to keep

Ante, Sec. 455; Cooley, Const. Lim. 541. *Legitimate use of streets:* See chapter on Streets, *ante*, Sec. 538, *et seq.*

[1] Hovey *v.* Mayo, 43 Maine, 322, 1857; Ernst *v.* Kunkle, 5 Ohio St. 520, 1856; Andover *v.* Gould, 6 Mass. 40; Boston *v.* Shaw, 1 Met. 130; Cole *v.* Muscatine, 14 Iowa, 296, 1862. *Supra*, Sec. 759.

Construction of special statutes: Cole *v.* Muscatine (remedy in Commissioner's Court), 14 Iowa, 296, 1862; Dalzell *v.* Davenport (mode of estimating and proof of damages), 12 Iowa, 437; Freeland *v.* Muscatine, 9 Iowa, 461. Since the decision in Callender *v.* Marsh, *supra*, the law as there held has been changed, and a specific remedy provided for such an injury: Ferwald *v.* Boston, 12 Cush. 574. This remedy excludes a civil action for all damages *necessarily* occasioned: Flagg *v.* Worcester, 13 Gray, 601, 1859: *ib.* 193; 6 Gray, 544; Benjamin *v.* Wheeler, 8 Gray, 409, 413. Statute giving damage caused by change of grade, held to extend to *property outside* of the city limits, as well as to that within the city: Columbus *v.* Woolen Mills Company, 33 Ind. 435, 1870.

[2] Reock *v.* Newark, 33 N. J. Law, 129, 1868. *Ante*, p. 625, note; *supra*, Sec. 778, note.

in mind the distinction between municipal corporations proper and *quasi* corporations, such as counties and townships, including therein, for this purpose, the *towns* of New England. With respect to corporations of the character last mentioned, it is almost universally considered that they are not liable to a civil action for damages occasioned by defective roads and bridges under their control as public agencies, unless so declared by statute. In the United States, *there is no common law obligation* resting upon such corporations to repair highways, streets, or bridges within their limits, and they are not obliged to do so unless by force of statute. Even when the legislature enjoins upon corporations of this character the duty to make and repair roads, streets, and bridges, and confers the power to levy taxes therefor, the general tenor of the decisions is to treat this as a *public*, and not a *corporate*, duty, and to regard these corporations, in this respect, as *public or state agencies*, and not liable to be sued civilly for damages caused by the neglect to perform this duty, unless the action be expressly given by statute.[1] As we shall presently see,[2] the quite uniform holding of the courts as to *municipal corporations proper* has been otherwise, though the ground for the distinction which gives an action if the injury happens within the limits of a municipality having control of the streets therein, and denies it if it happens within the limits of a township or county having equal control over the highways and adequate means of discharging its public duties in respect thereto, is not as satisfactory to the mind as could be desired. With few exceptions, the courts have agreed in holding that these lower or more general forms of corporate organization are not impliedly liable to such actions. There is somewhat more diversity of view respecting the implied liability of municipal corporations proper, where

[1] *Ante*, Secs. 761–765, and cases cited; *ante*, p. 30, Sec. 10; Sutton *v.* Board, 41 Miss. 236, 1866; Larkin *v.* Saginaw County, 11 Mich. 88; Cooley *v.* Freeholders, 3 Dutch. (N. J.) 415, 1859, approving Freeholders *v.* Strader, 3 Harr. (N. J.) 108, 1840; Pray *v.* Jersey City, 32 N. J. Law, 394; Huffman *v.* San Joaquin County, 21 Cal. 426; Hedges *v.* Madison County, 1 Gilm. (Ill.) 567; Detroit *v.* Blakeby, 21 Mich. 84, *per Campbell*, C. J.; Soper *v.* Henry County, 26 Iowa, 264, 1868, and see cases cited in that state in which counties are held responsible for safe condition of public bridges.

[2] *Infra*, Sec. 789.

the control over streets exists, but no action for neglect is expressly given; still, the two classes of cases establish, upon authority, the distinction mentioned.

§ 786. The difficulty of satisfactorily ascertaining the grounds of the difference in the liability of the two classes of corporations is avoided in the New England states, by the course of adjudication therein on the subject. It was decided, as we have seen, at an early day, that *towns*[1] were not liable to such actions unless the liability be created by statute, and that view has been maintained ever since, and applies, as respects defective and unsafe ways, equally *to streets in cities and highways in towns.* It being established that there was no common law obligation upon towns to respond for neglect of duty in respect to highways and bridges, the legislatures of each of the New England states have imposed the duty upon towns to keep their highways in repair, so as to be safe and convenient for travelers, and have given, in terms, to persons injured by neglect to discharge this duty, an action against the town. The substance of *the statutes of the New England states* in this respect, and upon which the decisions to be referred to have been made, is given in the note.[2] Upon *neither towns nor cities*, in the view of the courts of New England, is there any implied liability for injuries resulting from defective streets or

[1] *Supra*, Secs. 762, 763. As to nature of New England towns: *Ante*, p. 34, Sec. 11.

[2] *Massachusetts statute.*—By the Revised Statutes, Chap. XXV. Sec. 1, "All highways, townways, causeways, and bridges within the bounds of any town" are required to "be kept in repair at the expense of such town, so that the same may be *safe and convenient for travelers*, with their horses, teams, and carriages, at all seasons of the year." By Sec. 22, it is provided that "if any person shall receive any injury in his person or property by reason of any *defect or want of repair*, which has existed for the space of twenty-four hours in any highway," he may *recover compensation therefor.* And the same provision, with the exception of the limitation of twenty-four hours, is re-enacted in the statute of 1850, Chap. V. and, in substance, in the General Statutes of 1860, Chap. XLIV. Sec. 22, p. 247. History of legislation traced by *Hoar*, J.: Stanton *v.* Springfield, 12 Allen, 566.

Rhode Island.—Substantially the same. Construed: Providence *v.* Clapp, 17 How. 161.

Vermont statute.—The language of the Vermont statute is: "If any special damage shall happen to any person, his team, carriage, or other property,

sidewalks; the liability is wholly statutory.[1] An important consequence is that every case of this character must be within the statute; and hence the liability of the town or city does

by means of the *insufficiency or want of repair* of any highway or bridge in any town, which such town is bound to repair," the town shall be liable.

Connecticut statute.—The Connecticut statute, in substance, is, that the several towns shall make and keep in *good and sufficient repair* all the needful highways and bridges, &c., and if *any person shall be injured*, in his person or property, through, or by *means of, a defect* in the road or bridge, he may recover damages of the town, &c.

New Hampshire statute.—In New Hampshire, by the statute of February 27, 1786, it is provided, "that in case any special damage shall happen to persons or their teams or carriages by means of the *insufficiency or want of repair* of any highway or bridge in any town or parish, the party aggrieved shall recover his damage in an action against such town or parish. And the said town shall have a remedy over against the surveyor of highways through whose fault or neglect the same happened:" Revised Statutes, Chap. XLVII. Sec. 1.

Maine statute.—By the statute in Maine (Revised Statute of 1841, Chap. XXV.), all highways, &c. are to be "*kept in repair and amended* from time to time, that the same may be *safe and convenient* for travelers," &c.; in default thereof, the town in which such neglect of duty occurs is made liable. And any person receiving "any bodily injury," or suffering "any damage in his property, through any defect or want of repairs, * * * may recover, in a special action of the case, of the county, town, or persons who are by law obliged to repair the same, the amount of damages thereby sustained, if such county, town, or person had *reasonable notice* of the defect or want of repair."

[1] It is the language of one of the most accomplished judges that ever sat upon the uniformly able supreme judicial bench of Massachusetts, speaking of this subject, that, "The liability of towns for defects in ways is wholly the creation of statutes, and is a liability strictly limited and peculiar:" *Per Hoar*, J., Oliver *v.* Worcester, 102 Mass. 489, 496, 1869; Mower *v.* Leicester, 9 Mass. 247, 1812; Commonwealth *v.* Springfield, 7 Mass. 9, 1810; Brady *v.* Lowell (city of), 3 Cush. 121, 124, 1849; Bacon *v.* Boston, 3 Cush. 174, 1849; Brailey *v.* Southborough, 6 Cush, 141, 1850; Smith *v.* Dedham, 8 Cush. 522, 1851; Hixon *v.* Lowell, 13 Gray, 59, 64, 1859; Vinal *v.* Dorchester, 7 Gray, 421, 422. "The obligation resting upon towns in relation to the support of highways and bridges, is not imposed by the *common law*, but is *wholly* a creature of the statute:" *Per Waite*, J., in Chisey *v.* Canton, 17 Conn. 475, 478, 1846, approving Mower *v.* Leicester, 9 Mass. 247; Reed *v.* Belfast, 20 Maine, 248. So in *New Hampshire:* Farnum *v.* Concord, 2 N. H. 392, 1821, approved in Eastman *v.* Meredith, 36 N. H. 284, 1858; and note remarks of *Perley*, C. J., in the conclusion of his masterly opinion, pp. 298, 301. So in *Maine:* Reed *v.* Belfast, 20 Maine, 246, 248; Sanford *v.* Augusta, 32 Maine, 536; Peck *v.* Ellsworth, 36 Maine, 393. And *Vermont:* Baxter *v.* Winooki Turnpike Company, 22 Vt. 114, 123, 1849; Hyde *v.* Jamaica, 27 Vt. 443, 457, *per Bennett*, J.; State *v.* Burlington, 36 Vt. 521, *per Poland*, C. J.

not extend to persons not within the protection of the statute;[1] and hence, also, if it only gives a right of action when the defect has existed a certain length of time, this time must have elapsed when the injury happened, in order to make it actionable.[2]

§ 787. The judicial reports of the New England states abound with *decisions, under these statutes*, respecting what constitutes an actionable defect, insufficiency, or want of repair in a street or highway; what is required of towns in order to discharge their duty under the statute and escape liability; how much of the highway or street must be made safe and convenient; what degree of care is required of the plaintiff; what injuries result so directly and immediately from the defective or insufficient way, as to be within the statute; and questions of a like character. It will be perceived that these statutes are general in their language, and, in substance, impose the duty on towns (and they extend to cities as well) to make *their ways safe and convenient, and give an action for injuries* occasioned to the person or property of travelers by reason of *any defect or want of repair*. How far the duty they impose is coincident with the corresponding duty, which in other states is held by the courts to rest by implication upon municipal corporations, so as to make the adjudications in New England precisely applicable elsewhere, is a question respecting which we can properly do little more than to lay before the reader data to enable him to form upon it his own judgment. We venture to remark, however, that it is quite probable these statutes, as construed, do impose, in some respects, a greater measure of liability than would elsewhere be held to exist by implication. Many of the questions, however, which have arisen in actions upon them are obviously general in their nature, as, for example, the degree of care required of the plaintiff; what injuries may justly be regarded as proximately

[1] As the duty, under the statute of Massachusetts, is only towards *travelers*, it does not extend to the case of a person who is using the highway simply for the *purposes of play:* Blodgett *v.* Boston, 8 Allen, 237, 1864. Same principle: Stickney *v.* Salem, 3 *ib.* 374; Stinson *v.* Gardiner (city of), 42 Maine, 248, 1856.

[2] Brady *v.* Lowell, 3 Cush. 121, 1849.

caused by the unsafe or insufficient highway; the evidence competent in such actions, and, to some extent, the rules to measure the recovery; and the opinions of the courts of these states in deciding or discussing them may always be consulted with interest, and often with advantage, by the legal or judicial inquirer.

§ 788. Generally speaking, it may, perhaps correctly, be said that, under these statutes, a town or city charged with the duty of keeping its highways or streets in repair performs that duty when the traveled way is without obstructions or structural defects which endanger the safety of travelers, and is sufficiently level and smooth, guarded by railings where necessary, to enable persons, by the exercise of ordinary care, to travel with safety and convenience.[1]

The decisions respecting actionable defects under these statutes have been classified as follows[2]:—

1. Want of railings.
2. Obstructions to the traveled path by rocks, stones, wood, timber, posts, snow, ice, &c.
3. Holes or excavations in the traveled path, or so immediately contiguous as to make the highway itself unsafe.
4. Defective bridges and causeways, insufficient to support travelers.
5. Awnings, the doctrine in respect of which is limited and peculiar, if not exceptional.

In a work general in its character, like the present, it would not be in place to notice at length the cases arising under these local statutes. Following the classification just mentioned, it must suffice briefly to refer to some of the more important of them in the notes. By recurring to the statutes heretofore given,[3] the precise force and value of the decisions upon them will be better apprehended, and, in the light of these decisions,

[1] Hixon *v.* Lowell, 13 Gray, 59, 1859, *per Hoar*, J.; Barber *v.* Roxbury, 11 Allen, 318, 1865, *per Gray*, J.

[2] *Per Chapman*, J., in Keith *v.* Easton, 2 Allen, 552, 553, 1861; Barber *v.* Roxbury, 11 Allen, 318, 320, *per Gray*, J.; Sparhawk *v.* Salem, 1 Allen, 30, 1861.

[3] *Supra*, Sec. 786, note.

the state of the law in this country upon the general question of the *implied liability of municipal corporations* in respect of defective and unsafe streets and ways, be better understood.[1]

[1] DECISIONS IN THE NEW ENGLAND STATES RESPECTING DEFECTIVE STREETS AND SIDEWALKS—*"Safe and convenient," duty thus imposed, defined:* Raymond *v.* Lowell, 6 Cush. 524, 534, 1850; reviewed, Hubbard *v.* Concord, 35 N. H. 52, 1857; Gregory *v.* Adams, 14 Gray, 242, 1859, *per Merrick*, J.; Hixon *v.* Lowell, 13 Gray, 59, 1859, *per Hoar*, J.; Church *v.* Cherryfield, 33 Maine, 460, 1851; Johnson *v.* Haverhill, 35 N. H. 74, 1857, where the rule adopted by the Supreme Court as the proper construction of the statute is stated; Hubbard *v.* Concord, 35 N. H. 52; Davis *v.* Bangor, 42 Maine, 522, 1856; Packard *v.* New Bedford (oblique gutter across street), 9 Allen, 200; Keith *v.* Easton, 2 Allen, 552, *per Chapman*, J. Compare Morse *v.* Richmond, 41 Vt. 435, and note. S. C. 8 Am Law Reg. (N. S.) 81; Leicester *v.* Pittsford, 6 Vt. 245, 1834; Prindle *v.* Fletcher, 39 Vt. 255, 1867; and Clark *v.* Corinth, 41 Vt. 449, 1868, cited with approval, by *Dixon*, C. J., in Ward *v.* Jefferson, 24 Wis. 342, 1869.

The defect in the highway or street must be the DIRECT AND PROXIMATE CAUSE *of the special damage for which the statute gives an action:* Adams *v.* Carlisle, 21 Pick. 146; Holman *v.* Townsend, 13 Met. 297, 299, 1847; Horton *v.* Ipswich, 12 Cush. 488, 1853; Lund *v.* Tyngsboro (leaping from carriage on near approach to defect), 11 Cush. 563, 1853; Tuttle *v.* Holyoke, 6 Gray, 447, 1856; Sears *v.* Dennis, 105 Mass. 310, 1870; Stickney *v.* Maidstone, 30 Vt. 738, 1858, and cases cited by *Pierpont*, J.; Manderschid *v.* Dubuque, 29 Iowa, 73, 1870.

Defect causing team to be frightened: Marble *v.* Worcester, 4 Gray, 395, 1855; Cook *v.* Charlestown, 98 Mass. 80, 1867. Compare Morse *v.* Richmond, 41 Vt. 435. S. C. 8 Am. Law Reg. (N. S.) 81, and note of Judge *Redfield*. *Fright of team by accident, and injury thereto by a defect in the highway:* Davis *v.* Dudley, 4 Allen, 557, 1862, distinguished from Palmer *v.* Andover, 2 Cush. 600, and Howard *v.* North Bridgewater, 16 Pick. 189, explained; Fogg *v.* Nahant, 98 Mass. 578, 1868. See Manderschid *v.* Dubuque, 25 Iowa, 108, disapproving Davis *v* Dudley, *supra*. *Whether injury caused jointly by defective road and defect in plaintiff's wagon, horse, or harness, is actionable*, see conflicting views in Vermont and Massachusetts on the one hand, and Maine on the other: Hunt *v.* Pownal, 9 Vt. 418; Rowell *v.* Lowell, *supra;* Howard *v.* North Bridgewater, 16 Pick. 189; Marble *v.* Worcester, 4 Gray, 395; Palmer *v.* Andover, 2 Cush. 600, 1849; Shepherd *v.* Chelsea, 4 Allen, 113, 1862; Moore *v.* Abbott, 32 Maine, 46, 1850; Farrar *v.* Greene, 32 *ib.* 574; Moulton *v.* Sanford, 51 Maine, 127, 1862, following Moore *v.* Abbott, *supra*, which is denied to be law in Winship *v.* Enfield, 42 N. H. 197, 1860; Lacon *v.* Page, 48 Ill. 499; Joliet *v.* Verley, 35 Ill. 63.

Want of railings or barriers. If rails or barriers are necessary for the proper security of travelers, the authorities charged with the duty of keeping the roads in repair and safe condition must furnish them: Palmer *v.* Andover, 2 Cush. (Mass.) 600, 1849; commented on in Rowell *v.* Lowell, 7 Gray (Mass.) 100, 102; Jones *v.* Waltham (falling into cattle guards), 4 Cush. 299, 1849' Liability of railroad company: *Ib.* 202, *per Metcalf*, J.; Alger *v.* Lowell, 3.

§ 789. It may be fairly deduced from the many cases upon this subject referred to in the notes, that in the absence of an express statute imposing the duty and declaring the liability,

Allen (Mass.), 402, *ib.* 38; Burnham *v.* Boston (dangerous excavation), 10 Allen, 290, 1865; Stinson *v.* Gardiner (city of), 42 Maine, 248, 1856; Doherty *v.* Waltham (barriers removed by stranger in night time), 4 Gray, 596, 1855; Davis *v.* Hill, 41 N. H. 329, 1860; Hayden *v.* Attleborough, 7 Gray, 338, 1856; Williams *v.* Clinton (want of railing on embanked highway), 28 Conn. 264, 1859; Tolland *v.* Willington, 26 *ib.* 587. Duty to close or bar, by visible signs, if unsafe: Blaisdell *v.* Portland, 39 Maine, 113, 1855; Loker *v.* Damon, 17 Pick. 284; Drury *v.* Worcester, 21 Pick. 44. When road or street regarded as *opened:* State *v.* Cornville, 43 Maine, 427, 1857; Bowman *v.* Boston, 5 Cush. 1; Kellogg *v.* Northampton, 8 Gray, 504, 1857. Towns not bound to fence or erect *barriers to prevent travelers from getting outside of the way* when there is no unsafe place immediately contiguous: Sparhawk *v.* Salem, 1 Allen, 30, 1861; Murphy *v.* Gloucester, 105 Mass. 470, and cases cited by *Morton*, J.; Nebraska City *v.* Campbell (want of railing), 2 Black, 590; Chicago *v.* Gallagher, 44 Ill. 295, 1867.

Obstructions to the TRAVELED *path.* Towns must remove actionable obstructions to the traveled path or route *by whomsoever placed there.* But "are not liable for obstruction in portions of the highway, not part of the traveled path, and not so connected with it that they will affect the security or convenience for travel of those using the traveled path:" Smith *v.* Wendell, 7 Cush. 498, 500, 1851, *per Dewey*, J.: Shepardson *v.* Colerain, 13 Met. 55; Kellogg *v.* Northampton, 4 Gray, 65, 1855. S. C. 8 Gray, 504; Howard *v.* North Bridgewater, 16 Pick. 189; Cogswell *v.* Lexington, 4 Cush. 307; Hayden *v.* Attleborough, 7 Gray, 338, 1856. *Illustrations of what are obstructions:* A *stick* of timber, *logs*, &c: Springer *v.* Bowdoinham, 7 Maine, 442, 1831; Snow *v.* Adams, 1 Cush. 443, 1848. *Stones* in the road-bed of the traveled highway: Bigelow *v.* Weston, 3 Pick. 267, 1825; Smith *v.* Wendell, 7 Cush. 498; Kellogg *v.* Northampton, 4 Gray, 65. *Logs* by the side of traveled path: Johnson *v.* Whitefield, 18 Maine, 286; Davis *v.* Bangor, 42 Maine, 522, 527, *per Appleton*, J.; Snow *v.* Adams, 1 Cush. 443, 1848. A *post* by the side of the road, within the general course of travel: Cogswell *v.* Lexington, 4 Cush. 307. But see McComber *v.* Taunton, 100 Mass. 255. As to *rope* extended across the street being an obstruction or defect: French *v.* Brunswick, 21 Maine, 29 1842. But see Barber *v.* Roxbury, 11 Allen, 318, 1865, that it is not. "*Obstructions*," *or want of repairs defined* by *Bartlett*, J.: Ray *v.* Manchester, 46 N. H. 59, 1865. Loaded wagons *standing* on a street under care of a driver not "a defect or want of repair" of street: Davis *v.* Bangor, 42 Maine, 522, 1856.

Injury received by traveler *outside of the road*, though the road itself was dangerous, not within the statute, of which the words are, "injury *by reason* of any defect" in the highway: Tisdale *v.* Norton, 8 Met. 388, 1844. Nor ordinarily actionable: Sparhawk *v.* Salem, 1 Allen, 30, 1861. The doctrine in Massachusetts is, that the damage, in order to be actionable, must be occasioned by causes entirely within the highway: Richards *v.* Enfield, 13

municipal corporations proper having the powers ordinarily conferred upon them respecting bridges, streets, and sidewalks within their limits, owe to the public the duty to keep them

Gray, 344, 346, *per Bigelow*, J., citing and following Rowell *v.* Lowell, 7 Gray, 100, 1856. See, also, Keith *v.* Easton, 2 Allen, 552, 1861; Baltimore *v.* Brannan, 14 Md. 227, 1859. *Right to go extra viam:* Campbell *v.* Race, 7 Cush. 408, 410, and authorities cited.

Width to be kept in repair: Howard *v.* North Bridgewater, 16 Pick. 189, 1834; recognized in Shepardson *v.* Colerain, 13 Met. 55, 59, 1847; Bacon *v.* Boston, 3 Cush. 174, 1849, relating to width of sidewalk, and distinguished from Howard *v.* North Bridgewater, *supra;* Smith *v.* Wendell, 7 Cush. 498; Kellogg *v.* North Hampton, 4 Gray, 65, 7 Gray, 338. Whether *wide* enough to be *safe* is for the jury; so, whether it should be made safe and convenient its whole width: Johnson *v.* Whitefield, 18 Maine, 286; Aldrich *v.* Pelham, 1 Gray, 510; Savage *v.* Bangor, 40 Maine, 176.

Latent defects; liability for: Prindle *v.* Fletcher, 39 Vt. 257, cited with approval, 24 Wis. 342, 1869.

SIDEWALKS: Liability of town or city for actionable defects extends to sidewalks, they being deemed to constitute part of the street: Bacon *v.* Boston (a deep opening made by adjoining owner for cellar window), 3 Cush. 174, 1849; Lowell *v.* Spaulding, 4 Cush. 275; *Ib.* 277; Kirby *v.* Market Association, 14 Gray, 249, 1859; Manchester *v.* Hartford, 30 Conn. 118, 1861; Hubbard *v.* Concord, 35 N. H. 52, 1857, reviewing Raymond *v.* Lowell, 6 Cush. 524, and defining measure of duty, as respects sidewalks. Duty as respects crossings; foot passengers, where to cross: Raymond *v.* Lowell, 6 Cush. 524, 1850; Brady *v.* Lowell, 3 *ib.* 121, 1849. Right of *foot travelers* to travel *along and across street: Ib.;* Coombs *v.* Purrington, 42 Maine, 332, 1856; Bacon *v.* Boston, 3 Cush. 174; Baker *v.* Savage, 45 N. Y. 191, 1871. *What inequalities in surface actionable:* Raymond *v.* Lowell, 6 Cush. 524; Hubbard *v.* Concord, 35 N. H. 52; Smith *v.* Wendell, 7 Cush. 498; Winn *v.* Lowell, 1 Allen, 177; Lacon *v.* Page, 48 Ill. 499.

SNOW AND ICE. Under statute requiring highways to be made "safe and convenient at *all* seasons," &c. it is held that towns and cities are liable for defects and obstructions caused by snow and ice rendering them unsafe, the later decisions tending to restrict the liability: Loker *v.* Brookline, 13 Pick. 343, 1832; Horton *v.* Ipswich, 12 Cush. 488, 1853; Hall *v.* Lowell (injury upon sidewalk covered with ice), 10 Cush. 260, 262, 1852, remarks of *Metcalf*, J.; Stanton *v.* Springfield (doctrine carefully stated by *Hoar*, J.), 12 Allen, 566, 1866; Shea *v.* Lowell, 8 Allen, 136; *Ib.* 137; O'Neill *v.* Lowell, 6 Allen, 110, 1863; Street *v.* Holyoke, 105 Mass. 82, 1870, and cases cited by *Colt*, J.; Stone *v.* Hubbardston (when ice a defect), 100 Mass. 49, 57, 1868, and cases cited by *Gray*, J.; Gilbert *v.* Roxbury, *ib.* 185; Landolt *v.* Norwich (Superior Court of Connecticut), 6 Am. Law Reg. (N. S.), 383, 1872; Providence *v.* Clapp, 17 How. (U. S.) 161, 1854, construing statute of Rhode Island, which is substantially the same as that of Massachusetts; Green *v.* Danby, 12 Vt. 338, 1840; Barton *v.* Montpelier, 30 Vt. 650, 1858; Tripp *v.* Lyman (defect occasioned by *freezing and thawing*), 37 Maine, 250, 1854; Savage *v.* Bangor,

in a safe condition for use in the usual mode by travelers, and are liable in a civil action for special injuries resulting from

40 Maine, 176, 1855; Hubbard *v.* Concord (descending sidewalk icy and slippery), 35 N. H. 52; *ib.* 74; Hall *v.* Manchester, 40 N. H. 410, 1860. *As to liability elsewhere:* Cook *v.* Milwaukee, 24 Wis. 270, 1869; Ward *v.* Jefferson, 24 Wis. 342, 1869, construing statute of Wisconsin; Baltimore *v.* Mariott, 9 Md. 160, 1856; Achison *v.* King, Supreme Court of Kansas, not yet reported.

The owner or occupant of the building is not liable in such cases to the person injured on the sidewalk in front from *natural accumulations* of snow and ice: Kirby *v.* Market Association, 14 Gray, 249, 1859. Owner liable for injury caused by snow and ice falling from the roof: Shepley *v.* Fifty Associates, 101 Mass. 251.

AWNINGS AND FALLING SUBSTANCES: The statute of Massachusetts, before cited (*ante*, Sec. 786, note), is held to extend to injuries caused by defective awnings projected over the sidewalk, and where the defect or want of repair in the projection is of a nature to render its continuance dangerous to the public safety: Drake *v.* Lowell, 13 Met. 292, 1847; Day *v.* Milford, 5 Allen, 98. The question is close, and is admitted to reach the utmost limit of corporate liability, and the liability is regarded as exceptional. *Per Chapman*, J., in Keith *v.* Easton, 2 Allen, 552, 1861; Barber *v.* Roxbury, 11 *ib.* 318. And it was held in Hixon *v.* Lowell, 13 Gray, 59, 1859, that a city was not liable where the only defect in the street is the *projection from the roof* of a building not owned by the city *of a mass of ice and snow* which had gradually accumulated there until it overhung the traveled way and rendered the passing beneath dangerous. Nor is a city liable for injury sustained by a traveler on a sidewalk by the falling on him of a *sign suspended over the sidewalk* by the adjoining proprietor, and insecurely fastened, although the city had notice of the position and unsafe condition of the sign: Jones *v.* Boston, 104 Mass. 75, 1870. Nor by the *falling of an iron weight* attached to a flag which was suspended across the street by third persons: Huvison *v.* New Haven, 36 Conn. 136. Both of the cases last cited follow Hixon *v.* Lowell, 13 Gray, 59, in preference to Drake *v.* Lowell, 13 Met. 292, and state the distinction which, in Hixon *v.* Lowell, the court thought it easier to feel than express: 6 Am. Law Rev. 556. But is it easy either to feel or express the distinction? And does not the difficulty come from holding that the *statute* embraced a case like Drake *v.* Lowell.? See Jones *v.* New Haven (falling of dead limb from tree in public square), 34 Conn. 1, 1867. *Owner, and not tenant*, responsible for safety of awning, and if the town is held liable, it may recover over from the owner: Milford *v.* Holbrook, 9 Allen, 17, 1864; Lowell *v.* Short, 4 Cush. 275; *Ib.* 277. *Infra*, Sec. 795.

Dangerous holes or excavations in or near traveled way: Cobb *v.* Standish (miry watering place by the roadside), 14 Maine, 198, 1837; Reed *v.* Northfield (hole in the road), 13 Pick. 94, 1832; Norwich *v.* Breed, 30 Conn. 535, 1862; Murphy *v.* Gloucester, 105 Mass. 470, 1870; Ghenn *v.* Provincetown, *Ib.* 313.

Defective bridges and causeways are actionable. Degree of strength required: criterion of sufficiency: Richardson *v.* Turnpike Company, 6 Vt. 496, 1834; Gregory *v.* Adams, 14 Gray, 242, where an elephant was injured by a bridge giving way.

neglect to perform this duty.[1] Such a duty and liability are considered to exist, without a positive statute, when the following conditions concur: 1. The *place* in question, whether bridge, sidewalk, or street, must be one *which it is the duty of the corporation to repair or keep in a safe condition;* and this *duty* (to keep in repair), if not specifically enjoined, must arise upon a just construction of the charter or statutes applicable to the corporation. 2. This duty or burden must appear upon a fair view of the charter or statutes to be imposed, or rest upon the *municipal corporation, as such,* and not upon it as an agency of the state, or upon its officers as independent public officers. (This, however, in general, appears sufficiently where the municipality sought to be made liable exists under a special charter or general act which confers upon it peculiar powers and privileges as respects streets, their control and improvement, not possessed throughout the state at large under its general enactments concerning ways.) 3. The *power to perform the duty* of maintaining the streets in a safe condition, by authority to levy taxes or impose local assessments for the purpose, must be (as it almost always is) conferred upon the corporation.[2]

[1] Enforcing this duty by *mandamus:* See, *ante,* Sec. 673. By *indictment: Ante,* Secs. 745–748.

[2] Weightman *v.* Washington, 1 Black (U. S.), 39, 1861 (corporate liability for unsafe bridge); distinguished from Providence *v.* Clapp, 17 How. (U. S.) 161; and from Russell *v.* Men of Devon, 2 Term R. 667; and approving, Henley *v.* Mayor, &c. of Lyme, 5 Bing. 91; S. C. 3 Barn. & Adolph. 77; S. C. 2 Cl. & Fin. 331. Weightman *v.* Washington, above cited, was followed by Nebraska City *v.* Campbell, 2 Black, 590, 1862, where a city corporation, with control over streets, and power to levy taxes to keep them in repair, left a bridge on a street over a creek defective and unsafe for *want of side railing,* was held liable for damages happening in consequence. See, also, Chicago *v.* Robbins, 2 Black, 418, 1862; S. C. again, 4 Wall. 657, 1866; Mayor *v.* Sheffield (stump in sidewalk), 4 Wall. 189, 1866; Hutson *v.* Mayor of New York, 9 N. Y. (5 Seld.) 163, 1853. *Mason,* J., admits existence of cases of contrary bearing where the means to keep in repair are limited, but regards them as not applicable, since the city of New York "is possessed of the most ample powers in this respect:" *Ib.* 170. See Same Case, 5 Sandf. Sup. Ct. R. 289, and exposition of the ground on which it was decided by *Denio,* J., 9 N. Y. (5 Seld.) 456, 458, in Griffin *v.* Mayor, &c. of New York. And see, also, Lloyd *v.* Mayor, &c. of New York, 5 N. Y. (1 Seld.) 369, 1851; Mayor, &c. of New York *v.* Furze, 3 Hill, 612, 1842; approved by *Selden,* J., 16 N. Y. 162, note; 5 Seld. 168; *Ib.* 458; explained, 1 Denio, 595;

Where the duty to keep streets in repair is, in terms, enjoined upon the corporate authorities, and they are supplied with the means to perform it, there is little difficulty, we think, in holding the corporation liable, on the general principles of the law, without an express statute declaring the liability to a civil action by any one specially injured by its neglect to

32 N. Y. 165; Conrad *v.* Ithaca, 16 N. Y. 158, 1857; Weet *v.* Brockport, *ib.* 161, and review of cases in the learned opinion of *Selden*, J.; Storrs *v.* Utica, 17 N. Y 104, and cases cited; Davenport *v.* Ruckman, 37 N. Y. 568, 1868, in which *Hunt*, C. J., declares that the liability of the corporation of the city of New York extends to injuries arising from the *omission of the duty to repair*, as well as to those arising from some act done by it: Requa *v.* Rochester, 45 N. Y. 129, 1871; Erie *v.* Schwingle, 22 Pa. St. 384, 1853. *Wilful* neglect not essential to liability; and as to defence of want of funds, and want of means to raise them, see remarks of *Black*, C. J.; *Ib.* 384, 389 *As to bridges*, see *ante*, Secs. 579, 580, and index—Bridge. Blake *v.* St. Louis, 40 Mo. 569; Smith *v.* St. Joseph, 45 Mo. 449; St. Paul *v.* Kirby (injury to child), 8 Minn. 154; St Paul *v.* Seitz, 3 *ib.* 297; Topeka *v.* Tuttle, 5 Kansas, 425; Atchison *v.* King, Sup. Ct. of Kansas, not yet reported; State *v.* Mayor, &c. 11 Humph. (Tenn.) 217, 1850, *per McKinney*, J.; Smoot *v.* Wetumpka, 24 Ala. 112, 1854; Browning *v.* Springfield, 17 Ill 143, 1855; Joliet *v.* Verley, 35 Ill. 58; Bloomington *v.* Bay, 42 Ill. 503; Chicago *v.* Gallagher, 44 Ill. 295; Chicago *v* Johnson, 53 Ill. 91; Decatur *v.* Fisher, *ib.* 407; Rusch *v.* Davenport (defective bridge), 6 Iowa, 443, 1858; Rowell *v.* Williams, 29 *ib.* 210, 1870; Ellis *v.* Iowa City, *ib.* 229; *Ib.* 73; Soper *v.* Henry County, 26 *ib.* 264, 1868; McCullom *v.* County, 21 *ib.* 409; Pease *v.* Dayton (defective bridge), 4 Ohio St. 80, 1854; Tallahassee *v.* Fortune, 3 Flor. 19, 1850; Baltimore *v.* Mariott (ice on pavement), 9 Md. 174; Baltimore *v.* Pennington, 15 Md. 12, 1859; Baltimore *v.* Brannan (accident in a place not public), 14 Md. 227, 1859.

The principles stated in the text find no little support in the general reasons on which the judgments in several important recent cases in England rest: Foreman *v.* Canterbury, Law R. 6 Q. B. 214, 1871; Mersey Dock Cases, Law R. 1 H. L. 93; S. C 11 House of Lords Cases, 686, 1866. *Contra.* In New Jersey the view is taken that the duty of a city in respect to the repair of its streets is a *public duty* (not a corporate one), and that the neglect to perform it will not give a private remedy without an express statute: Pray *v* Jersey City, 32 N. J. 394, 1868; reaffirming, Freeholders *v.* Strader (*quasi* corporation), 3 Harr. (N. J.) 108, 1840. See, also, Detroit *v.* Blakeby, 21 Mich. 84; S. C. 9 Am. Law Reg. (N. S.) 670, with note. In Maryland the other extreme is held, and counties are liable without an express statute to a private action in respect of defective roads, on the ground that a public duty is enjoined with the means of performance, and that the public have a remedy for neglect by indictment and a party specially injured by action: County Commissioners *v.* Duckett, 20 Md. 468, 1863. See Brown *v.* Jefferson County, 16 Iowa, 339, assuming liability of *counties* for defective bridges. But see Soper *v.* Henry County, 26 Iowa, 264, for discussion of question.

discharge this specific duty. But where the duty to repair is not specifically enjoined, and an action for damages, caused by defective streets, is not expressly given, still, both the duty and the liability, if there be nothing in the charter or legislation of the state to negative the inference, has often, and, in our judgment, properly, been deduced from special powers conferred upon the corporation to open, grade, improve, and *exclusively control* public streets within their limits, and from the means which, by taxation and local assessments, or both, the law places at its disposal to enable it to perform this duty.

The municipal corporation is not an insurer against accidents upon the streets and sidewalks. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient if the streets (which include sidewalks and bridges thereon) are in a reasonably safe condition for travel in the ordinary modes, by night as well as by day, and whether they are so or not is a practical question, to be determined in each case by its particular circumstances.[1] The ground of the action is either *positive misfeasance* on the part of the corporation, its officers, or servants, or by others under its authority, in doing acts which cause the street to be out of repair, in which case no other notice to the corporation of the condition of the street is essential to its liability; or the ground of the action is the *neglect of the corporation* to put the streets in repair, or to remove obstructions therefrom, or to remedy causes of danger occasioned by the wrongful acts of others, in which cases notice of the condition of the street, or what is equivalent to notice, is necessary, as will presently be stated, to give to the person injured a right of action against the corporation, unless, indeed, the matter be otherwise regulated by statute.[2]

[1] Blake *v.* St. Louis, 40 Mo. 566, 571, *per* Wagner, J.; Seward *v.* Milford, 21 Wis. 485; Landolt *v.* Norwich, 6 Am. Law Reg. (N. S.) 383; Leicester *v.* Pittsford, 6 Vt. 245; Raymond *v.* Lowell, 6 Cush. 524, 534; Davenport *v.* Ruckman, 37 N. Y. 568, 1868; Johnson *v.* Haverhill, 35 N. H. 74; Ghenn *v.* Provincetown, 105 Mass. 313, 1870; Williams *v.* Clinton, 28 Conn. 264; Bacon *v.* Boston, 3 Cush. 174; Manderschid *v.* Dubuque, 29 Iowa, 73, 1870.

[2] *As to degree of care required of the plaintiff:* Fallen *v.* Boston, 3 Allen, 38; Gilman *v.* Deerfield, 15 Gray, 577; Griffin *v.* Mayor, 9 N. Y. 456; 4 Comst. 349; 5 Denio, 255, and cases cited; Cobb *v.* Standish (*woman* driving), 14 Maine, 198; Combs *v.* Purrington (walking in carriage way), 42 *ib.* 332;

It is also essential to liability that the plaintiff should have been using reasonable or ordinary care to avoid the accident, or, in other words, he must be free of any such fault or neglect on his part, as will in actions for negligence defeat a recovery. The case would be exceptional indeed when the plaintiff could properly recover vindictive, or more than actual or compensatory damages.

§ 790. Where streets have been rendered *unsafe by the direct act, order, or authority of the municipal corporation* (not acting through independent contractors, the effect of which will be considered presently), no question has ever been made, or can reasonably exist, as to the liability of the corporation for injuries thus produced, where the person suffering them is without fault, or was using due care.[1] Where the duty to keep

Davenport *v.* Ruckman, 37 N. Y. 568; Beatty *v.* Gilmore, 16 Pa. St. 463; Seward *v.* Milford, 21 Wis. 485; Weisenberg *v.* Appleton, 26 Wis. 56; Murphy *v.* Dean, 101 Mass. 455, 1869; Norris *v.* Litchfield, 35 N. H. 271; *Ib.* 530; Winn *v.* Lowell (plaintiff with poor sight), 1 Allen, 177; Lynch *v.* Smith (injury to child), 104 Mass. 52; Hyde *v.* Jamaica, 27 Vt. 443. *Infra*, Sec. 790.

Plaintiff's knowledge of defect — Effect of: President, &c. *v.* Dusouchett, 2 Ind. 587; Farnum *v.* Concord, 2 N. H. 392; Reed *v.* Northfield, 13 Pick. 94; Mahoney *v.* Metropolitan Railroad Company, 104 Mass. 73; Humphreys *v.* County, 56 Pa. St. 204, 1869.

Onus in respect to proving due care on part of plaintiff is upon him: Law *v.* Crombie, 12 Pick. 176; Moore *v.* Abbott, 32 Maine, 46; *Ib.* 574; Murdock *v.* Warwick, 4 Gray, 178, and cases; *Ib.* 395, 397, *per Shaw*, C. J.; Rowell *v.* Lowell, 7 Gray, 100; Rusch *v.* Davenport, 6 Iowa, 443, 1858. *Contra*, Beatty *v.* Gilmore, 16 Pa. St. 463, 1851, where the subject is carefully considered; Erie City *v.* Schwingle, 22 *ib.* 384.

Effect of plaintiff's violation of ordinances on his right of recovery: Baker *v.* Portland, 58 Maine, 99; 10 Am. Law Reg. (N. S.) 559, and note of Judge *Redfield;* denying, Heland *v.* Lowell, 3 Allen, 104, 1862.

Effect of intoxication of plaintiff: Alger *v.* Lowell, 3 Allen, 402.

Measure of damages — What jury may consider: Chicago *v.* Langlass, 52 Ill. 256, 1869, and Decatur *v.* Fisher, 53 Ill. 407, 1870, denying right of jury to give exemplary damages; McGary *v.* Lafayette, 12 Rob. (La.) 668; S. C. *ib.* 674; *Ib.* 4 La. An. 440; Chicago *v.* Martin, 49 Ill. 241; Atchison *v.* King, Sup. Ct. Kansas, MS. 1872, not yet reported; Raymond *v.* Lowell, 6 Cush. 524, 537, 1850; Beecher *v.* Bridge Company, 24 Conn. 491; Masters *v.* Warren, 27 *ib.* 293, 1858; Reed *v.* Belfast, 20 Maine, 246; Nebraska City *v.* Campbell, 2 Black (U. S.), 590, 1862.

[1] Detroit *v.* Corey (sewer excavation), 9 Mich. 165, 1861; Lloyd *v.* Mayor, &c. (dangerous excavation) 1 Seld. 369, 1851; Weet *v.* Brockport, 16 N. Y.

its streets in safe condition rests upon the corporation, it is liable for injuries caused by its *neglect or omission* to keep the streets in repair,[1] as well as for those caused by defects occasioned by the *wrongful acts of others*;[2] but, as in such case the

161, note; Chicago *v.* Major (uncovered city cistern in street), 18 Ill. 349; approved, but distinguished, Chicago *v.* Starr, 42 Ill. 174, 1866, where the city was held not liable for an injury caused by the fall of a counter, leaning against a fence, on a sidewalk; Dayton *v.* Pease, 4 Ohio St. 80, 1854, in which the city was held liable for damages caused by the fall of a bridge built upon a *defective plan*, furnished by the city engineer; Cincinnati *v.* Stone, 5 Ohio St, 38, 1855; Conrad *v.* Ithaca, 16 N. Y. 158; Wendell *v.* Troy, 39 Barb. 329, 1862; Mayor *v.* Sheffield, 4 Wall. 189, 1866; Grant *v.* Brooklyn (act of a city water commissioner in opening a sewer), 41 Barb. 381, 1864; Baltimore *v.* Pennington, 15 Md. 12, 1859. *Infra*, Sec. 791.

[1] Hutson *v.* Mayor, &c. of New York, 9 N. Y. 163, 1853; Hickok *v.* Plattsburg, 16 N. Y. 161; Davenport *v.* Ruckman, 37 N. Y. 568, 1868; Bloomington *v.* Bay, 42 Ill. 503, 1867; Atchison *v.* King, Supreme Court of Kansas, 1872 (not yet reported). *Supra*, Sec. 789. *Contra:* Detroit *v.* Blakeby, 21 Mich. 84; S. C. with note of Judge *Redfield*, 9 Am. Law Reg. (N. S.) 670.

[2] *Ante*, Sec. 788, and note on page 753; Hickok *v.* Plattsburg, 16 N. Y. 161, note (*negligent omission* to fill up ditch which a wrongdoer had excavated in the street); Wendell *v.* Troy, 39 Barb. 329; Requa *v.* Rochester, 45 N. Y. 129, 1871; Serrot *v.* Omaha City, 1 Dillon, C. C. R. 312, 1871; Griffin *v.* Mayor, &c. 9 N. Y. (5 Seld.) 456, 1853; Tallahassee *v.* Fortune, 3 Fla. 19, 1850.

Liability for injuries received on street by the fall of an unsafe wall: In Georgia, a city corporation with the usual power to keep streets in repair and to remove buildings and obstructions thereon, was considered to have the power, which it was bound to exercise, to remove any nuisance which rendered the use of the street dangerous, such as a deep pit dug near the sidewalk, or an unsafe wall adjoining it, and it was held to be liable to a person injured by the fall of a high brick wall of a burnt house, on private property, at the line of the sidewalk, if it was negligent in the discharge of its duty to have the wall abated or made secure. The court admitted that if the wall was firm and had been thrown down by a tempest, there would be no liability: Parker *v.* Macon, 39 Ga. 725, 1869. But, in Louisiana, a precisely opposite conclusion, as to the liability of a city corporation for the falling of an unsafe wall, was reached in Howe *v.* New Orleans, 12 La. An. 481, 1857. In Jones *v.* New Haven, 34 Conn. 1, 1867, it was held that a city with power to protect and regulate trees in the squares and streets, and which had by ordinance prohibited any interference by others with such trees, was liable for an *injury caused by the falling of a dead limb* which the city had *negligently* allowed to remain upon a tree in the public square. The decision, however, is rested by the court upon general principles, and not upon the duty to keep streets and ways in repair: Jones *v.* New Haven, 34 Conn. 1, 167. *Supra*, Sec. 780, Sec. 788, and note on page 755 (awnings). See observation of *Hoar*, J., in Hixon *v.* Lowell, 13 Gray, p. 63.

basis of the action is negligence, *notice* to the corporation of the defect which caused the injury, or facts from which notice thereof may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability; for in such cases the corporation, in the absence of a controlling enactment, is responsible only for reasonable diligence to repair the defect or prevent accidents after the unsafe condition of the street is known, or ought to have been known, to it, or to its officers having authority to act respecting it.[1]

§ 791. Whether *the duty* of maintaining the streets in a safe condition for public travel and use, is specially imposed on the corporation, or is deduced, in the manner before stated, it *rests primarily, as respects the public, upon the corporation*, and the obligation to discharge this duty cannot be evaded, suspended, or cast upon others, by any act of its own. Therefore, according to the better view, where a *dangerous excavation is made* and negligently left open (without proper lights, guards, or covering), in a traveled street or sidewalk, *by a contractor* under the corporation for building a sewer or other improvement, the corporation is liable to a person injured thereby, although it may have had no immediate control over the workmen and had even stipu-

[1] Dewey *v.* Detroit, 15 Mich. 307, 1867, where the duty of street commissioners and the rule as to notice are clearly stated by *Campbell*, J.; Mayor *v.* Sheffield, 4 Wall. 189, 1866; McGinity *v.* Mayor, &c. of New York, 5 Duer, 674; Griffin *v.* Mayor, &c. of New York, 9 N. Y. 456, 1853; Requa *v.* Rochester, 45 N. Y. 129, 1871; Serrot *v.* Omaha City, 1 Dillon, C. C. R. 312, 1871; Dorlon *v.* Brooklyn, 46 Barb. 504.

As to necessity of notice to city, or *the lapse of sufficient time to acquire knowledge, of the unsafe condition of the street*, see, also, Ward *v.* Jefferson, 24 Wis. 2; Hubbard *v.* Concord, 35 N. H. 52; *ib.* 74; Reed *v.* Northfield, 13 Pick. 94; Worster *v.* Canal Company, 16 Pick. 541; Hart *v.* Brooklyn, 36 Barb. 226; Weightman *v.* Washington, 1 Black, 39, 62, *per Clifford*, J.; Manchester *v.* Hartford, 30 Conn. 118; Howe *v.* Lowell, 101 Mass. 99; Bloomington *v.* Bay, 42 Ill. 503, 509, 1867; Vandyke *v.* Cincinnati, 1 Disney (Ohio), 532. *Infra*, Sec. 795. The House of Lords, upon great consideration, have recently held that having the *means of knowledge*, and *negligently remaining ignorant, is equivalent* in creating a liability *to actual knowledge:* Mersey Docks *v.* Gibbs, 11 H. L. Cas. 687, 701; S. C. Law Rep. 1 H. L. 93, 1866; Weisenberg *v.* Appleton, 26 Wis. 56, 1870. Notice *not* necessary when city is in fault: Springfield *v.* Le Claire, 49 Ill. 476, 1866; Barton *v.* Syracuse, 36 N. Y. 54, 58, *per Bockes*, J.

lated in the contract that proper precautions should be taken by the contractor for the protection of the public, and making him liable for accidents occasioned by his neglect.[1] It is immaterial, as respects the primary liability of the corporation in such a case, whether it has or has not inserted such a clause in agreement with the contractor. If, however, it has taken the precaution to obtain from the contractor an express stipulation of this character, this will give it, on being held liable (however it might otherwise be), a remedy over against him.[2]

[1] Storrs *v.* Utica (sewer excaxation), 17 N. Y. 104, 1858, *per Comstock*, J.; Detroit *v.* Corey (sewer excavation), 9 Mich. 165, 1861, where the same principle was applied, and the result of Storrs *v.* Utica concurred in, although the city was bound to let the contract to the lowest bidder; *Campbell*, J., dissenting, on the ground, mainly, that the city, being required to let to the lowest bidder, could not itself have built the sewer, and the relation of principal and agent did not exist between the city and the contractor—the majority holding that such relation did exist, and that the contractor had, and could have, no right to make the excavation, except as the agent of the city. In an early case in California (James *v.* San Francisco, 6 Cal. 528, 1856), it was held that there was no corporate liability where the city was obliged to let the contract to the lowest bidder. See, also, Springfield *v.* Le Claire, 49 Ill. 476, 1866, following Storrs *v.* Utica, and disapproving Painter *v.* Pittsburg, 46 Pa. St. 221, cited *infra;* S. C. 3 Am. Law Reg. (N. S.) 350, with useful note by Mr. (now Judge) *Mitchell*; Chicago *v.* Robbins, 2 Black, 418; S. C. 2 Am. Law Reg. (N. S.) 529, assumes the same principle; Blake *v.* St. Louis, 40 Mo. 569, 1867, which overrules, probably, Barry *v.* St. Louis, 17 Mo. 121, 1852, cited *infra;* St. Paul *v.* Seitz, 3 Minn. 297, 308, 1869, *per Flandrau*, J.; Baltimore *v.* Pennington, 15 Md. 12, 1859. Compare Westchester *v.* Apple, 35 Pa. St. 284, 1860, which, in its result and reasoning, is against the general doctrine of the courts elsewhere, and rests upon the questionable basis that a city corporation has the right to disregard its duty to the public to keep its streets in a safe condition. Painter *v.* Pittsburg, *supra*, is against the principle stated in the text, but, as pointed out by Mr. *Mitchell* in his note, the ground upon which the doctrine of the text rests "was apparently not urged in the argument, and is not noticed by the court." Barry *v.* St. Louis, 17 Mo. 121, 1852, referred to above. The latest New York case there cited is the case of Bailey, 2 Denio, 433, 1845, and the proposition that the city is primarily liable for the defective or dangerous condition of its streets, and should not be allowed, in executing a work attended with danger, to shift this responsibility by contract, does not appear to have been presented to the court.

[2] Buffalo *v.* Holloway, 7 N. Y. (3 Seld.) 493, 1852, affirming S. C. 14 Barb. 101. It is here held that as between the corporation and contractor, there is no *implied* agreement to protect the public; but is this right? See Storrs *v.* Utica, 17 N. Y. 104, 1858; Blake *v.* Ferris, 1 Seld. (N. Y.) 48; Myers *v.* Snyder, Brightley (Pa.), 489; Beatty *v.* Gilmore, 16 Pa. St. (4 Harris) 463, 1851.

And so, on the same principle, namely, that the duty to keep the streets and sidewalks in a safe condition rests upon the corporation and cannot be surrendered or abdicated, it is liable for injuries caused by open excavations made therein, with its knowledge or consent, express or implied, by the adjoining lot owner for the purpose of an area or to obtain light and air for the basement or cellar; but in such cases the corporation has, without any express contract, if not itself in fault, a remedy over against the owner of the lot or building for whose benefit the excavation was made.[1]

§ 792. There has been much controversy as to the liability of a municipal corporation for the *negligence or wrongful acts of contractors under it* in the execution of the work agreed to be performed. Ordinarily, no person other than the one immediately or actually guilty of the wrongful act is liable therefor, except upon the ground that the relation of principal or agent, or master and servant, existed between the person or corporation sought to be made liable, and the person who did the act, or was guilty of the negligence that caused the injury. In other words, the principle of *respondeat superior* does not extend to cases of independent contracts, where the party for whom the work is to be done is not the *immediate superior* of those guilty of the wrongful act, and has no choice in the selection of workmen, and no control over manner of doing the work under the contract. Such is the general rule;[2] but it is im-

[1] Chicago *v.* Robbins, 2 Black, 418; S. C. 4 Wall. 657; 2 Am. Law Reg. (N. S.) 529, 1862, distinguishing Hilliard *v.* Richardson, 3 Gray, 349, and overruling Scammon *v.* Chicago, 25 Ill. 424, on this point; Rowell *v.* Williams (excavation for cellar), 29 Iowa, 210, 1870, following and approving Chicago *v.* Robbins; Wendell *v.* Troy, 39 Barb. 329.

[2] Blake *v.* Ferris, 1 Seld. 48, 1851; Storrs *v.* Utica 17 N. Y. 104, 1858, and note well grounded doubts of *Comstock*, J., respecting the correctness of the *application* of the doctrine, so well stated in Judge *Mullett's* opinion in Blake's Case, to the *dangerous* work of excavating a deep hole in a public street; Pack *v.* Mayor, &c. (injury by blasting) 8 N. Y. 222, 1853; and see similar case of Kelly *v.* Mayor, &c. 11 N. Y. 432, both approved in Storrs *v.* Utica, but distinguished; Cincinnati *v.* Stone, 5 Ohio St. 38, 1855; Hilliard *v.* Richardson, 3 Gray, 349, "and which contains," says Mr. Justice *Davis* (in Chicago *v.* Robbins, 2 Black, 418), "a most elaborate and able discussion of the doctrine of *respondeat superior*," with a full review of the authorities.

portant to bear in mind that it does not apply where the contract directly requires the performance of a *work intrinsically dangerous*, however skillfully performed. In such a case, the party authorizing the work is justly regarded as the author of the mischief resulting from it, whether he does the work himself or lets it out by contract.[1]

§ 793. Accordingly, the later and better considered cases in this country respecting streets have firmly, and, in our judgment, reasonably, established the doctrine, that where *the work contracted for necessarily constitutes an obstruction or defect* in the street of such a nature as to render it unsafe or dangerous for the purposes of public travel, unless properly guarded or protected, the employer (equally with the contractor), where the injury results *directly* from the acts which the contractor engaged to perform, is liable therefor to the injured party. But the employer is not liable where the obstruction or defect in the street causing the injury is wholly collateral to the contract work, and entirely the result of the negligence or wrongful acts of the contractor or his servants. In such a case the immediate author of the injury is alone liable.[2]

§ 794. No person, not even the adjoining owner, whether the *fee* of the street he in himself or in the public, has the right to do any act which renders the use of the street hazardous or less secure than it was left by the municipal authorities. Whoever does so, whether by excavations made in the sidewalk

[1] Storrs *v.* Utica, 17 N. Y. 104, 1858; Lockwood *v.* Mayor, &c. 2 Hilton (N. Y.), 66, 1858; Springfield *v.* LeClaire, 49 Ill. 476, 1866. *Infra*, Sec. 793, and cases cited.

[2] Robbins *v.* Chicago, 4 Wall. 657, 679, 1866, and cases cited, *per Clifford*, J., whose statement of the principle is substantially adopted in the text. See, also, on prior appeal, 2 Black, 418, where Scammon *v.* Chicago, 25 Ill. 424, is on one point disapproved; Storrs *v.* Utica, 17 N. Y. 104, 1858; approving but distinguishing, Pack *v.* Mayor, &c. (injury by blasting) 8 N. Y. 232; Kelly *v.* Mayor, &c. (like case) 11 N. Y. 432. See, also, Cincinnati *v.* Stone, 5 Ohio St. 38, 1855; Goudier *v.* Cormack, 2 E. D. Smith (N. Y.), 254; Detroit *v.* Corey, 9 Mich. 165, 1861, concurring in result of Storrs *v.* Utica; Springfield *v.* LeClaire, 49 Ill. 476, 1866; compare, Clark *v.* Fry, 8 Ohio St. 358, 1858.

by the abutter,[1] or by unsafe hatchways left therein,[2] or by opening, or leaving open, an area-way in the pavement,[3] or by undermining the street or sidewalk, or by placing unauthorized obstructions thereon, which make the use of the street unsafe or less secure,[4] is guilty of a nuisance, and is liable to any person who, using due care, sustains any special injury therefrom; and in such cases, the person who created or continues the nuisance, is thus liable, irrespective of the question of negligence on his part.[5] In accordance with these principles, the owner of a building and lot is liable for personal injuries sustained by the breaking of a flag-stone, or defective grating forming part of the sidewalk adjoining the building and covering an excavation made without authority, and used by the owner for private purposes.[6] It follows that it is no answer to such an action, that the work, including the defective covering, was done for the owner at a fixed price by contractors, who agreed to do it properly. The doctrine of *respondeat superior*

[1] Bush *v.* Johnston, 23 Pa. St. 209, 1854; Chicago *v.* Robbins, 2 Black, 418; S. C. 4 Wall. 657, 1866; Rowell *v.* Williams, 29 Iowa, 210, 1870; following, Chicago *v.* Robbins, *supra;* Pfau *v.* Reynolds, 53 Ill. 212. *Ante,* Sec. 521, and note, p. 505.

[2] Severin *v.* Eddy, 52 Ill. 189, 1869.

[3] Beatty *v.* Gilmore, 16 Pa. St. 463, 1851; Durant *v.* Palmer, 5 Dutch. (N. J.) 544, 1862. *Ante,* Secs. 553, 554.

[4] Congreve *v.* Smith, 18 N. Y. 79, 1858; Congreve *v.* Morgan, 18 N. Y. 84; Harlow *v.* Humister, 6 Cow. (N. Y.) 189, 1826; Wood *v.* Mears, 12 Ind. 515, 1859; Ball *v.* Armstrong (building material in gutter), 10 *ib.* 181; Howe *v.* New Orleans (unsafe burnt wall), 12 La. An. 481, 1857; Parker *v.* Mason (unsafe wall), 39 Geo. 725, 1869.

[5] Congreve *v.* Smith, 18 N. Y. 79, 1858; Congreve *v.* Morgan, 18 N. Y. 84; following, on this point, Dygert *v.* Schenck, 23 Wend. 446, and distinguished from Daniel *v.* Potter, 4 C. & P. 262, which involved "no question of liability for a consequential injury from a direct invasion of the street, or wrongful act:" *Per Strong,* J., 18 N. Y. 86. See, also, Irwin *v.* Fowler (coal scuttle in sidewalk), 5 Rob. (N. Y.) 482. Note, on this point, the guarded language of Mr. Justice *Davis, obiter,* in Chicago *v.* Robbins, 2 Black (U. S.), 418, 1862.

[6] Congreve *v.* Smith, 18 N. Y. 79, 1858; Congreve *v.* Morgan, 18 N. Y. 84; Dygert *v.* Schenck, 23 Wend. 446. Even if there be authority from the city corporation to make the excavation, this implies "that it is to be done with proper precautions to prevent accidents to travelers," and such a work is lawful only so long as it is safe: Robbins *v.* Chicago, 4 Wall. 657, 679, *per Clifford,* J.: S. P. in S. C. 2 Black, 418.

has no application to such a case. And because the owner is bound, at his peril, to keep the excavation covered so as to be as safe as if it had not been made, he is not discharged from liability by the fact that, having provided a sufficient covering, it was, without his knowledge, fractured or rendered unsafe by the wrongful acts of others.[1]

§ 795. The ultimate liability, however, in such cases, is upon the *author or continuer of the nuisance;* but if the party injured elects to proceed against the municipal corporation for failing in its duty to keep the streets and sidewalks in a safe condition for public travel, and there is no statute dispensing with notice as a condition of liability, he must show notice to the corporation of the obstruction or defect, or at least, neglect of duty in not ascertaining it.[2] If the person injured fail in his action against the municipality, this is no bar to an

[1] Congreve *v.* Morgan, 18 N. Y. 84, 1858.

The owner of a building is not liable for defects in sidewalk occasioned by *natural causes*, as by accumulations of *ice and snow* thereon: Kirby *v.* Market Association, 14 Gray, 249; *supra*, Sec. 788, and note on p. 754.

Defects in ways caused by *railroad companies: Infra*, Sec. 796.

[2] *Supra*, Sec. 790; McGinity *v.* Mayor, &c. of New York, 5 Duer, 674, 1856; Griffin *v.* Mayor, &c. of New York, 9 N. Y. (5 Seld.) 456; Portland *v.* Richardson, 54 Maine, 46, 1866; Veazie *v.* Railroad Company, 49 *ib.* 119; Chicago *v.* Robbins, 2 Black (U. S.), 418, 1862. S. C. 4 Wall. 657, 1866; Durant *v.* Palmer, 5 Dutch. (N. J.) 544, 1862. No liability by owner of land if in the use of his land he places logs outside of the *legal* highway, but within the road as fenced: Harlow *v.* Humiston, 6 Cow. 189, 1826.

Liability for act of agent or servant: Harlow *v.* Humiston, 6 Cow. 189, 1826; Samyn *v.* McCloskey, 2 Ohio St. 536, 1853.

Liability as between owner and tenant: Durant *v.* Palmer, 5 Dutch. (N. J.) 544, 1862; Milford *v.* Holbrook, 9 Allen, 17; Lowell *v.* Spaulding, 4 Cush. 277, 1849; Lowell *v.* Short, *ib.* 275; Kirby *v.* Market Association, 14 Gray, 249, 1859; Stephani *v.* Brown, 40 Ill. 428, 1866. *Supra*, Sec. 788, note, p. 755.

Liability of author of a dangerous and unguarded excavation on his own land *near a frequented sidewalk or street:* Norwich *v.* Breed, 30 Conn. 535, 1862. Compare Howland *v.* Vincent, 10 Met. 371; Hardcastle *v.* Railroad Company, 4 Hurlst. & Norm. 67; Hounsel *v.* Smyth, 7 Com. B. (N. S.) 729; Manderschid *v.* Dubuque, 29 Iowa, 73, 1870. *Ante*, Sec. 780. Parker *v.* Mason (unsafe wall), 39 Ga. 725, 1869; Howe *v.* New Orleans (unsafe wall), 12 La. An. 481; Rowell *v.* Williams, 29 Iowa, 210. No liability against the owner for maintaining an area cover in a highway where this existed at the *time of the dedication* of the highway *to the public:* Fisher *v.* Prowse, 110 Eng. Com. Law. 770, and cases reviewed by *Blackburn*, J. *Ante*, p. 755, note.

action by him against the author of the nuisance.[1] If a municipal corporation be held liable for damages sustained in consequence of the unsafe condition of the sidewalks or streets, it has a remedy over against the person by whose act or conduct the sidewalk or street was rendered unsafe, unless the corporation was itself a wrong-doer, as between itself and the author of the nuisance;[2] and if the latter had *notice of the pendency of the action against the municipality*, and could have defended it, he has been held to be concluded as to the existence of the the defect or nuisance in the street, and as to the liability of the corporation to the plaintiff in consequence thereof, and as to the amount of damage or injury it occasioned.[3] But although duly notified he is not, says the Supreme Court of the United States, "estopped from showing that he was under no obligation to keep the street in a safe condition, and that it was not through his fault that the accident happened."[4]

§ 796. Towns and cities in the New England States are obliged, as we have seen, by statute, to keep their highways and streets in repair;[5] and *railroad companies* in the same states have frequently been authorized by law *to construct their roads over public highways and streets*, the effect of which may be to cause the latter to be out of repair. Under these circumstances, the question arises if a person suffers damage by reason of a defective highway or street thus occasioned, who is responsible—the railroad company which caused the defect,

[1] Severin *v.* Eddy, 52 Ill. 189, 1869.

[2] Chicago *v.* Robbins, 4 Wall. 657, 1866. S. C. 2 Black, 418; Portland *v.* Richardson, 54 Maine, 46, 1866, and cases cited; Milford *v.* Holbrook, 9 Allen, 17.

[3] Boston *v.* Worthington, 10 Gray, 496, 1859; Milford *v.* Holbrook, 9 Allen, 17; Portland *v.* Richardson, 54 Maine, 46, 1866; Veazie *v.* Railroad Company, 49 *ib.* 119.

[4] Chicago *v.* Robbins, 2 Black (U. S.), 418, 1862, *per Davis*, J. S. C. 4 Wall. 657, 1866, in both of which it is held that it is not necessary that the notice should have been express or formal. Effect of record in former action: King *v.* Chase, 15 N. H. 1; Littleton *v.* Richardson, 34 N. H. 179, 187, 1856, and cases cited, and where the subject is fully examined; Boston *v.* Worthington, 10 Gray, 496; Westchester *v.* Apple, 35 Pa. St. 584; Portland *v.* Richardson, 54 Maine, 46, 1866.

[5] *Ante*, Secs. 786–788.

or the town or city which is charged with the general duty of maintaining and keeping in repair the public ways? The course of decision in the New England States is to hold the town or city *primarily* responsible to the person sustaining the injury, thus compelling it, when held liable, to seek indemnity from the railroad company.[1] In such a case, the railroad company is liable to the town or city for its neglect, or that of its workmen, and for the neglect of the workmen of a contractor who had agreed to construct the railroad for a stipulated sum. But the town or city can only recover of the railroad company *single damages*, although it had to pay double damages; nor can it recover from the railroad company the *costs and expenses* of the action brought by the traveler against it, unless the action was defended at the request of the railroad company, or for its benefit.[2]

§ 797. In this connection may be considered the liability of municipal corporations *for injuries to private property in consequence of being overflowed with water* caused by improvements

[1] Phillips *v.* Veazie, 40 Maine, 96, 1855; Currier *v.* Lowell, 16 Pick. 17, 1834, cited *infra;* Elliott *v.* Concord, 7 Foster, 204, 1853; Batty *v.* Duxbury, 24 Vt. 155, 1852; Willard *v.* Newbury, 22 Vt. 458, 1850; Barber *v.* Essex, 27 Vt. 62; Roxbury *v.* Railroad Company, 6 Cush. 430; Redfield on Railways, 391. State *v.* Gorham, 37 Maine, 451, holds the same doctrine as to *bridges.* See further, on this subject: *Ante,* Secs. 560, 561, and note on p. 538; also, Sec. 747, note on p. 699; Kittredge *v.* Milwaukee, 26 Wis. 46. As to liability for defects *at the crossing:* Davis *v.* Leominster, 1 Allen, 182.

The traveler may, of course, elect to proceed at once against the railroad company if he chooses: Lowell *v.* Railroad Company, 23 Pick. 24, 31; Eliott *v.* Concord, 7 Fost. (N. H.) 204, 1853, construing statute. See, also, Willard *v.* Newbury, 22 Vt. 458; Batty *v.* Duxbury, 24 Vt. 155.

In Massachusetts a town is not responsible for injuries sustained by a traveler on a highway by the *running of the cars* of a railroad company *across the highway:* Vinal *v.* Dorchester, 7 Gray, 421, 1856. The case of Currier *v.* Lowell, 16 Pick. 170, carries the liability of towns to its extreme limits: *Ib. per Shaw,* C. J. Nor by reason of a *telegraph post* erected by authority of the law within the limits of the highway: Young *v.* Yarmouth, 9 Gray, 386, 1857. *Ante,* Sec. 552.

[2] Lowell *v.* Railroad company, 23 Pick. 24, 1839, growing out of Currier *v.* Lowell, 16 Pick. 170, 1839. S. P. Lowell *v.* Short, 4 Cush. 275, 1849; Same *v.* Spaulding, *ib.* 277; Willard *v.* Newbury, 22 Vt. 458. See, on this subject, Rex *v.* Inhabitants of St. George, &c. 3 Campb. 222, 1812; King *v.* Liverpool, 3 East, 86, 1802; Littleton *v.* Richardson, 34 N. H. 179, 1856. *Remedy over* against author of nuisance. *Ante,* Secs. 794, 795.

made, or work done, upon the streets, under their authority. And here it is important to distinguish between *natural streams* flowing in channels between defined and actual banks, and *surface water*, caused by rain or melting snow, for the law relating to them is very different, and the powers of the municipality much greater with respect to the latter than the former.[1] Assuming the stream to be of the former character, and that the municipality is without any valid legislative powers changing what would otherwise be the legal rights of the parties, its authorities under the general power to grade and improve streets, or construct public improvements beneficial to it, cannot deprive others of their property rights in the water-course, or injure them by badly constructed and insufficient culverts or passage ways obstructing the free flow of the water, without being liable therefor.[2]

[1] 3 Kent Com. 439, 440; 2 Washb. Real Prop. 64 pl. 40; 1 West. Jur. 12, Article on "Surface Waters." See Ross *v.* St. Charles, Supreme Court of Missouri, 1872, not yet reported, as to "living" and "permanent" stream. Flagg *v.* Worcester, 13 Gray, 601, 607, 1859, and cases there cited by *Merrick*, J.; Goodale *v.* Tuttle, 29, N. Y. 459, 1864; Briscoe *v.* Drought, 11 Ir. C. L. R. 250; Wood *v.* Waud, 3 Exch. (W. H. & G.) 748.

[2] Baron *v.* Baltimore, 2 Am. Jur. 203, approved in Stetson *v.* Faxon, 19 Pick. 147, 158, 1837, and see, also, Thayer *v.* Boston, *ib.* 510; Gardner *v.* Newburgh (diverting water-course), 2 Johns. Ch. 162, 1816. *Ante*, Sec. 97, note. *Supra*, Sec. 780.

Insufficient or defective water-ways or culverts: Haynes *v.* Burlington, 38 Vt. 350, 1865; Wheeler *v.* Worcester, 10 Allen, 591, 1865, where *Colt*, J., states carefully some of the duties of a municipal corporation in bridging a water-course: Parker *v.* Lowell, 11 Gray, 353, 1858; Perry *v.* Worcester (action of tort for back water), 6 Gray, 544, 1856; Sprague *v.* Worcester 13 Gray, 193, 1859, same bridge as in case last cited; Lawrence *v.* Fairhaven, 5 Gray, 110; Talbot *v.* Whipple, 7 Gray, 122; Rochester Lead Company *v.* Rochester (poorly constructed culvert), 3 Comst. 463, 1850, explained by *Denio*, C. J., in Mills *v.* Brooklyn, 32 N. Y. 489, 1865. S. C. 5 Am. Law Reg. (N. S.) 33 and note; Ross *v.* Madison (insufficient culvert), 1 Ind. 281, 1848. S. C. 3 *ib.* 236, 1851; Dayton *v.* Pease, 4 Ohio St. 80, 1854; Mayor *v.* Randolph, 4 Watts & Serg. 514; Ross *v.* St. Charles (back water), *supra*. Good faith and honest exercise of judgment are no defence in an action for damages caused by inadequate artificial water-way: Perry *v.* Worcester, *supra*. Liability does not extend to *extraordinary* freshets: Sprague *v.* Worcester, *supra*. Except such as, looking at the history of the stream in this respect, may be "reasonably expected occasionally to occur." *Per Chancellor Walworth:* Mayor, &c. *v.* Bailey, 2 Denio, 433, followed by Madison *v.* Ross, 3 Ind. 236, 1851.

§ 798. As to *surface water*, quite different principles apply. This the law very largely regards (as Lord Tenterden phrases it) as a common enemy, which every proprietor may fight or get rid of as best he may. The reports contain many instances in which it has been sought to make municipal corporations liable for damages caused, in various ways, by surface water, to private property. Reference will first be made to cases in which the work of grading or improving the streets has been the cause of the injury. Where the damage has resulted solely as a consequence of the proper execution of a legal power by the corporation, it falls within the principle already mentioned,[1] and there is no implied liability therefor. Authority to establish grades for streets, and to graduate them accordingly, involves the right to make changes in the surface of the ground, which may affect injuriously the adjacent property owners; but where the *power* is not exceeded there is no liability, unless created by statute, and then only in the mode and to the extent provided, for the consequences resulting from its being exercised and properly carried into execution. On the one hand, the owner of property may take such measures as he deems expedient to keep surface water off from him or turn it away from his premises on to the street; and, on the other hand, the municipal authorities may exercise their powers in respect to the graduation, improvement and repair of streets without being liable for the consequential damages caused by surface water to adjacent property.

§ 799. It is clear that there is no liability on the part of a municipal corporation for *not exercising* powers it may possess to improve streets, and, as part of such improvement, to construct gutters or provide other means of drainage for surface waters so as to prevent them from flowing upon the adjoining lots.[2] And even when the work of graduating the streets has

[1] *Ante*, Secs. 781, 782, 783. *Post*, Sec. 802.

[2] Wilson *v.* Mayor, &c. of New York, 1 Denio, 595, 1845, cited *infra*, Sec. 800; Mills *v.* Brooklyn, 32 N. Y. 489, 1865; Flagg *v.* Worcester, 13 Gray, 601, 1859; Roll *v.* Augusta, 34 Geo. 326, 1866; Carr *v.* Northern Liberties, 35 Pa. St. 324, 1860; City Council *v.* Gilmer, 33 Ala. 116, 1858; S. C. 26 *ib.* 665; Atchison *v.* Challiss, 9 or 10 Kansas, not yet reported — overruling Leavenworth *v.* Casey, McCahon (Kansas), 124; Bennett *v.* New Orleans (omission to repair draining machine), 14 La. An. 120, 1859; *supra*, Sec. 753.

been entered upon, there is not, ordinarily, if ever, any liability to the adjoining owner arising merely from the non-action of the corporation in not providing means for keeping surface waters from property situate below the established grade of the street.[1] There are, indeed, cases which go further, and assert that there is no such liability where, in making improvements upon streets or elsewhere, *authorized by law*, surface waters are purposely turned from one's own land to that of another — from the street directly upon the adjacent property owner.[2] We agree to the doctrine that the municipal authorities are not bound to protect from surface water those who may be so unfortunate as to own property below the level of the street; nor is the duty a perfect one, to adopt a system or mode of drainage which will have this effect; and if one be adopted, there is no liability except as to ministerial duties in connection therewith It is possible there may be no middle ground, but we are unable to assent to the doctrine, that by reason of their control over streets, and the power to grade and improve them, the corporate authorities have the legal right intentionally to divert the water therefrom as a mode of protecting the streets, and discharging it, by artificial means, in increased quantities, and with collected force and destructiveness, upon the property, perhaps improved and occupied, of the adjoining owner.[3]

[1] Same authorities; *supra*, Secs. 753, 783.

[2] Turner *v.* Dartmouth, 13 Allen, 291, 1866; Greeley *v.* Railroad Company, 53 Maine, 200, 1865; Dickinson *v.* Worcester, 7 Allen, 19, 1863; Gannon *v.* Hargadon, 10 Allen, 106; Flagg *v.* Worcester, 13 Gray, 601; Franklin *v.* Fisk, 13 Allen, 211; Barry *v.* Lowell, 8 Allen, 127; Parks *v.* Newburyport, 10 Gray, 28; Bangor *v.* Lansil, 51 Maine, 521, 1863; compare, Brine *v.* Railway Company, 110 Eng. Com. Law, 402, 1862; Pennoyer *v.* Detroit, 8 Mich. 534, 1860; Pettigrew *v.* Evansville, 25 Wis. 223, 1870; Lambar *v.* St. Louis, 15 Mo. 610, 1852; Adams *v.* Walker, 34 Conn. 466, 1867; Commissioners *v.* Wood, 10 Pa. St. 93, 1848; Ellis *v.* Iowa City, 29 Iowa, 229, 1870; Nevins *v.* Peoria, 41 Ill. 502.

[3] See and compare on this point, in addition to the cases last referred to, Flagg *v.* Worcester, 13 Gray, 601, 1859, and Livingston *v.* McDonald, 21 Iowa, 160, 1866; Bentz *v.* Armstrong, 8 Watts & Serg. 40, 1844, remarks of *Kennedy*, J.; Brine *v.* Railway Company, 110 Eng. Com. Law, 402; *infra*, Secs. 800–802.

§ 800. If, in consequence of filling streets and cross-streets to the established grade line, water is *collected in ponds or pools* upon the adjoining lots which are thus brought below the level of the streets, the corporation is not liable for damages thereby occasioned,[1] not even, it has been held, where it would have been practicable, in the judicial judgment, to have prevented it by the construction of tunnels, openings, or drains; but upon the last point the cases are conflicting.[2]

§ 801. Since the duty of *providing drainage or sewerage for surface water* is in its nature *judicial or quasi judicial*, requiring the exercise of judgment as to the time when, and the mode in which, it shall be undertaken, the claims of respective localities as to order of commencement when it cannot all be effected at once, and the best plan which the means at the disposal of the corporation renders it practicable to adopt, it follows, upon legal principles, that the corporation is not liable to a civil action for *wholly failing to provide drainage or sewerage*,[3]

[1] Clark *v.* Wilmington, 5 Harring. (Del.) 243, 1849; *supra*, Sec. 783. *Contra.* Weeks *v.* Milwaukee, 10 Wis. 242, 1860; modified in Smith *v.* Milwaukee, 18 Wis. 63, 1864, and resting on doubtful grounds. See, also, Nevins *v* Peoria, 41 Ill. 503.

[2] Wilson *v.* Mayor, &c., of New York, 1 Denio, 595, is the leading case holding this doctrine. It is expressly approved by *Denio*, C. J., in Mills *v.* Brooklyn, 32 N. Y. 489, 1865, who says that it has always been referred to (in that state) as an accurate exposition of the law. S. P. Clark *v.* Wilmington, 5 Harring (Del.) 243, 1849; *supra*, Sec. 783. *Contra:* Cotes *v.* Davenport, 9 Iowa, 227, 1859; approved, Templin *v.* Iowa City, 14 *ib.* 59; Weeks *v.* Milwaukee, cited in preceding note; Nevins *v.* Peoria, 41 Ill. 502, 1866, where *Lawrence*, J., disapproves of Wilson *v.* Mayor, *supra*, but admits that the rule there declared has been quite generally adopted; Mears *v.* Wilmington, 9 Ire. (Law) 73, 82, also disapproves of Wilson *v.* Mayor, &c., on the ground that it overlooks the implied condition that the work should be done properly. But who is to *judge* whether it would have been practicable to have provided for the drainage of the lots in making the improvement —the city authorities, as maintained in the New York cases, or the judicial tribunals? See Brine *v.* Railway Company, 110 Eng. Com. Law, 402, 1862; *supra*, Sec. 799.

[3] Mills *v.* Brooklyn, 32 N. Y. 489, 1865; S. C. 5 Am. Law Reg. (N. S.) 33, with note of Mr. (now Judge) *Mitchell;* Wilson *v.* Mayor, &c. 1 Denio, 595; *supra*, Secs. 753, 755, note; Child *v.* Boston, 4 Allen, 41, 52, 1862; Carr *v.* Northern Liberties, 35 Pa. St. 324, 1860; City Council *v.* Gilmer, 33 Ala. 116, 1858; S. C. 26 *ib.* 665; Atchison *v.* Challiss, Supreme Court of Kansas, MS. 1872 (9 or 10 Kansas), overruling Leavenworth *v.* Casey, McCahon (Kansas), R. 124.

nor, probably, for any *defect or want of efficiency in the plan* of sewerage or drainage adopted;[1] nor, according to the prevailing and perhaps correct view, for the *insufficient size or want of capacity of gutters or sewers* for the purpose intended, particularly if the adjoining property is not in any worse position than if no gutters or sewers whatever had been constructed.[2]

§ 802. But where the duty as respects drains and sewers ceases to be judicial, or *quasi* judicial, *and becomes ministerial*, then, although there be no statute giving the action, a municipal corporation is liable for the negligent discharge or the negligent omission to discharge such duty, resulting in an injury to others.[3] Therefore, in accordance with this distinction between judicial and ministerial duties (a distinction plain in theory, but oftentimes difficult of application to particular cases), a municipal corporation is liable for negligence in the

[1] *Ib.* Child *v.* Boston, 4 Allen, 41, 1862, cited *infra*, Sec. 802, which was three times argued. The admirable opinion of Mr. Justice *Hoar* illustrates several phases of the question of corporate liability. "Upon mature deliberation, we are all of opinion that the defendants (the city of Boston) are not responsible for any defect or want of efficiency in the *plan* of drainage adopted:" *Ib.* p. 51. The corporation is not responsible for any error or want of judgment upon which its system of drainage was devised: *Per Denio*, C. J., in Mills *v.* Brooklyn, 32 N. Y. 489, 1865, who distinguishes such a case from one where there is a *want of skill* in constructing the work when entered upon. See *supra*, Sec. 781, note; *infra*, Sec. 802.

[2] Same authorities, particularly Mills *v.* Brooklyn, *supra*, which was a case purely where the drain or sewer was *not sufficiently large*, and the corporation was held not liable. See, also, Barry *v.* Lowell, 8 Allen, 127, 1864, distinguished from Child *v.* Boston, *supra;* Flagg *v.* Worcester, 13 Gray, 601, 1859; note to Mills *v.* Brooklyn, 5 Am. Law Reg. (N. S.) 33, 44; Atchison *v.* Challiss, above cited; Dermont *v.* Detroit, 4 Mich. (Gibbs) 435, 1857. In Carr *v.* Northern Liberties, 35 Pa. St. 324, 1860, it was held that a municipal corporation was not liable for neglecting to provide a sufficient number of inlets to its sewers (constructed for drainage purposes), which were sufficient when constructed; but which have ceased to be so in consequence of the greater extent of territory since graded and built upon.

[3] Barton *v.* Syracuse, 36 N. Y. 54, 1867; 37 Barb. 392; Child *v.* Boston, 4 Allen (Mass.), 41, 1862. Compare Dermont *v.* Detroit, 4 Mich. 435, 1857; City Council *v.* Gilmer, 33 Ala. 116, 1858; S. C. 26 *ib.* 665; Jones *v.* New Haven, 34 Conn. 1; Logansport *v.* Wright, 25 Ind. 512; *supra*, Sec. 753. *Ministerial duties*, as distinguished from those which are discretionary or *quasi* judicial, are such as are "absolute, certain, and imperative:" *Per Denio*, C. J., in Mills *v.* Brooklyn, 32 N. Y. 489, 1865.

ministerial duty to keep its sewers (which it alone has the power to control and keep in order) in repair as respects persons whose estates are connected therewith by private drains, in consequence of which such persons sustain injuries which would have been avoided had the sewers been kept in a proper condition.[1] If the sewer is *negligently permitted to become obstructed or filled* up so that it causes the water to back-flow into cellars connected with it, there is a liability therefor on the part of the municipal corporation having the control of it, and which is bound "to preserve and keep in repair erections it has constructed so that they shall not become a source of nuisance" to others.[2] The work of constructing gutters, drains, and sewers, is ministerial, and when, as usually is the case, the undertaking is a corporate one, the corporation is responsible in a civil action for damages caused by the careless or unskillful manner of performing the work.[3]

[1] Child *v.* Boston, 4 Allen, 41, 1862; *supra*, Sec. 778. There is considered to be no liability in Massachusetts on the part of a city for failing to keep a public cesspool and sewer in repair, in consequence of which waste water accumulates and flows into neighboring cellars *not connected with the sewer:* Barry *v.* Lowell, 8 Allen, 127, 1864, distinguished from Child *v.* Boston, *supra.* But where the reason on which this distinction rests does not apply, and where the work would be regarded as a corporate one, the duty to prevent it becoming a nuisance might be such, we think, as to impose a liability on the corporation for injuries which would not have been suffered had it been kept in order: *Supra*, Sec. 780.

[2] Barton *v.* Syracuse, 36 N. Y. 54, 1867; Mayor, &c. of New York *v.* Furze, 3 Hill (N. Y.), 612, 1842, explained in Wilson *v.* Mayor, &c. of New York, 1 Denio, 595, 1845, and in Mills *v.* Brooklyn, 32 N. Y. 489, 1865, and the ground of the decision stated as in the text. City cannot discharge drainage into a mill-race owned by others: Columbus *v.* Woolen Company, 33 Ind. 435, 1870; but may connect its sewerage with any natural flow of water, and is not liable for the falling in of a sewer (with which it has connected it own) which it did not build, and which, being on private property, it has no right to enter to repair, and where the injury is not shown to have resulted from the connection of the city's sewer with the old sewer, whose fall caused the injury: Munn *v.* Pittsburg, 40 Pa. St. 364, 1861. Liability of city for drain at end of wharf: Richardson *v.* Boston, 19 How. 270.

[3] *Supra*, Secs. 753, 779, 780, 781. In Child *v.* Boston, 4 Allen, 41, 1862, it is held that the mayor and aldermen of Boston, in building sewers, act as public statutory officers, and not as agents of the city; but generally the power to construct sewers is private or corporate. This is very clearly explained by *Manning*, J., in Detroit *v.* Corey, 9 Mich. 165, 184, 1861; Mills *v.* Brooklyn, 32 N. Y. 489, 1865; Dermont *v.* Detroit, 4 Mich. 435, 1857; Ross *v.* Madison, 1 Ind. 281; Commissioners *v.* Wood, 10 Pa. St. 93, 95.

The principle, indeed, is a general one, that while there is no implied liability for damages necessarily occasioned by the construction of any municipal improvement authorized by law, yet if the work thus authorized be not executed in a proper or skillful manner, there will arise a common law liability for all damages, not necessarily incident to the work, and which are chargeable to the unskillful or improper manner of executing it.[1]

[1] Same authorities. *Supra*, Secs. 779, 781. Brine *v.* Railway Company, 110 Eng. Com. Law, 402, 411, *per Crompton*, J, cited, 11 House of Lords Cases, 714; Sprague *v.* Worcester, 13 Gray, 193, 1859, *per Shaw*, C. J.; Perry *v.* Worcester, 6 Gray, 544, 1856, and cases cited; Proprietors of Locks, &c. *v.* Lowell, 7 Gray, 223; Flagg *v.* Worcester, 13 Gray, 601, 605; City Council *v.* Gilmer, 33 Ala. 116, 1858; S. C 26 *ib.* 665; Barton *v.* Syracuse, 36 N. Y 54, 1867; Conrad *v.* Ithaca, 11 N. Y. 158; Cowley *v.* Sunderland (mayor of), 6 H. & N. 565, 1861. Further as to the right to maintain actions against bodies executing public works, under legislative authority, for the improper mode in which their powers have been exercised, see opinion of *Blackburn*, J., in Mersey Docks Cases, 11 House of Lords Cases, 713, *et seq.*

And here, according to its plan, the present work is brought to a close. Mr. WILLCOCK, in concluding a similar treatise upon the Municipal Corporations of England, before the Reform Act, disgusted with their petty disputes, intrigues, and corruptions, declared that they had long since ceased to have any beneficial operation, and added: "I have traveled through this work as a merchant from Medina to Damascus, a weary waste of way: there is as little to gratify the mind in the investigation, as to please the eye in the desert." Such has not been our experience in the present work. On the contrary, the extensive field over which we have just passed has presented at every turn new and interesting subjects for contemplation.

Our municipalities, in their creation and operations, stand closely related both to the Government and to the Law. They offer to the Legislator and the Jurist questions of perplexing intricacy and deepest moment. How thoroughly our municipal institutions are wrought into the frame work of our govern-

ment and administration, how important the functions they are made habitually to discharge, how closely in the exercise of their diversified powers, and in the performance of their varied duties, they touch the daily life and affect the most important interests of the citizen, cannot fail to impress even the most inattentive observer. They are quickened by the spirit of the times, and in all their multiform purposes they illustrate its activity and enterprise. Walled towns belong to a past age. The violence and insecurity of that age have also passed away, but in their place, our chartered corporations, particularly our large cities, are encountering the perils, not less alarming, of corruption and fraud on a gigantic scale, engendered by the large revenues and official patronage at their disposal, and the disinclination, often the steady refusal, of the substantial citizens to take a controlling part in the management of municipal affairs.

How best to govern our cities is yet an unsolved problem in legislation; but it is clear, that for the excesses to which municipal bodies are prone the Courts afford the most effectual, if not the only, remedy; and it is impossible to rise from the survey of the authority of the judicial tribunals over them, to enforce their rights on the one hand, and to enforce rights against them on the other, without profound admiration for the learning and conservative wisdom of the judges as displayed in the recorded judgments, which we have sought to photograph in these pages.

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